

**WHY THE GOVERNMENT SHOULD CARE ABOUT
PORNOGRAPHY: THE STATE INTEREST IN PRO-
TECTING CHILDREN AND FAMILIES**

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

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WHY THE GOVERNMENT SHOULD CARE ABOUT PORNOGRAPHY: THE STATE INTER- EST IN PROTECTING CHILDREN AND FAMI- LIES

THURSDAY, NOVEMBER 10, 2005

UNITED STATES SENATE,
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND
PROPERTY RIGHTS, OF THE COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Sam Brownback [Chairman of the Subcommittee] presiding.

Present: Senators Brownback, Hatch and Feingold.

Chairman BROWNBACK. Good afternoon. The hearing will come to order. Thank you all for being here today. This is a hearing that has been scheduled I believe twice before, and I want to thank in particular the witnesses for their persistence in continuing to be willing to adjust schedules so they could be here to testify.

OPENING STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Chairman BROWNBACK. The infiltration of pornography into our popular culture and our homes is an issue that every family now grapples with. Once relatively difficult to procure, it is now so pervasive that it is freely discussed on popular prime time television shows. The statistics on the number of children who have been exposed to pornography is alarming.

According to recent reports, one in five children between the ages of 10 and 17 have received a sexual solicitation over the Internet, and nine out of 10 children between the ages of eight and 16 who have Internet access have viewed porn websites, nine out of 10 children, usually in the course of looking up information for homework.

There is strong evidence that marriages are often adversely affected by addiction to sexually explicit material. At a recent meeting of the American Academy of Matrimonial Lawyers, two-thirds of the divorce lawyers who attended said that excessive interest and online pornography played a significant role in divorces in the past year. Pornography has become both pervasive and intrusive in print, and especially on the Internet. Lamentably, pornography is now also a multibillion-dollar-a-year industry.

While sexually explicit material is often talked about in terms of free speech, too little has been said about its devastating effect on

users and their families. Today we hope to shed some light on what is happening to our society, particularly children and families, as a result of pornography. The Federal judiciary continues to challenge our ability to protect our families and our children from gratuitous pornographic images.

Earlier this year, Judge Gary Lancaster of the Western District of Pennsylvania, threw out a 10-count indictment against Extreme Associates, purveyors of the vilest sort of pornography. The defendants were in the business of producing films that according to one report, "even porn veterans find disturbing." A co-owner of Extreme Associates even boasted that the films which depict rape, torture and murder, represent, "the depths of human depravity." He also proudly admitted that the films covered by the indictment met the legal definition of obscenity.

Judge Lancaster not only dismissed the indictment, but also took the case as an opportunity to rule all Federal statutes regulating obscenities unconstitutional as applied to these admittedly infringing defendants. In order to achieve this result, Judge Lancaster cobbled together hand-picked strands of 14th Amendment substantive process decisions from *Roe v. Wade* to *Lawrence v. Texas*, and ruled that the statutes at issue violated an unwritten constitutional right to sexual privacy.

Even if one granted this spurious constitutional reasoning that such a right existed, it would not apply to the defendants, since they were producers and not consumers of the material in question.

In contrast to the Federal judiciary, the Department of Justice has renewed its commitment to protecting our children and families from the harms of pornography. During Attorney General Gonzales's confirmation hearing he was asked if he would make it a priority to prosecute violations of obscenity statutes more vigorously, and he made a commitment to do so. In responding to other Senators' questions, he also stated, "Obscenity is something else that very much concerns me. I've got two young sons, and it really bothers me about how easy it is to have access to pornography."

I have young children too. I share the Attorney General's concern about children's access to pornography. I appreciate the efforts the Attorney General has made during his first year in office to combat this problem.

Last spring Attorney General Gonzales reiterated the pressing need for urgent action to be given to pervasive violation of obscenity law, insisting that, "Another area where I would advance the cause of justice and human dignity is in the aggressive prosecution of purveyors of obscene materials. I'm strongly committed to ensuring the right of free speech. The right of ordinary citizens and of the press to speak out and to express their views and ideas is one of the greatest strengths of our form of Government, but obscene materials are not protected by the First Amendment, and I'm committed to prosecuting these crimes aggressively."

The Attorney General has followed through on his promise in several ways, begun the widespread effort with an obscenity prosecution task force. I deeply appreciate those efforts and I support them.

In previous hearings we have looked into the constitutionality of obscenity prosecutions and the distinctions between obscenity and

speech according to established court precedent. Today we will focus on another interest the Government has in the matter of prosecuting obscenity, the demonstrable harm it effects on our marriages and families.

I think most Americans agree and know that pornography is bad. They know that it involves exploitive images of men and women and that it is morally repugnant and offensive. What most Americans do not know is how harmful pornography is to users and to their families. I fear Americans do not fully know or appreciate the serious and imminent risk it poses to families and especially to children. I hope that through this hearing we will see just how mainstream pornography has become and the effects pornography has on family.

Today we have five distinguished witnesses. The first is Pamela Paul. Ms. Paul is the author of the recently published book "Pornified," which examines pornography's impact on men, women, children and families. She is a contributor to Time Magazine where she covers social trends and issues affecting the families. Ms. Paul, pleased to have you here. Her first book, "The Starter Marriage and the Future of Matrimony," was named one of the best books of the year by the Washington Post in 2002.

The second witness is Dean Rodney Smolla, the Dean of the University of Richmond School of Law. Dean Smolla graduated first in his class out of Duke Law School in 1978, and served as law clerk on the Fifth Circuit Court of Appeals. He is the author or co-author of 11 books including "Free Speech in an Open Society."

The third witness today is Jill Manning, a practicing marriage and family therapist and Ph.D. candidate from Brigham Young University. She is a former Social Science Fellow at the Heritage University.

The fourth witness today will be Leslie Harris, Senior Consultant and Executive Director Designee at the Center for Democracy and Technology. She has held a number of positions within the ABA and the ACLU, including Chief Legislative Counsel for the ACLU's Washington National Office.

And finally we will have Richard Whidden, Executive Director and Senior Counsel at the National Law Center for Children and Families. He graduated from University of Alabama Law School in '89, went on to serve as Assistant Attorney General of Florida.

I want to turn to my ranking member, Senator Feingold, for any opening statement that he might have.

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR
FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you, Mr. Chairman. I know you care a great deal about this issue and I respect your concern, and of course, many of us have concerns in this area.

I fully support efforts to bring to justice those who would commit the horrendous crimes of child pornography and human sex trafficking. Congress has done a great deal of work in this area, as has the Justice Department, and I commend the dedicated prosecutors and investigators who have devoted themselves to the fight against child pornography and human sex trafficking. They are doing very

important work and deserve our gratitude and our complete support.

As a father as well, I also understand the importance of preventing children from obtaining or viewing explicit materials. It would be harmful to them, and I recognize the difficulty that parents face in this regard. Congress has repeatedly attempted to address this problem in the past, but unfortunately it has not done a very good job of passing legislation that is consistent with the First Amendment. If legislation goes beyond materials that constitute child pornography and obscenity, the constitutional hurdles become even greater.

If Congress is to address these issues it is critically important that we avoid repeating our past mistakes. We must do all we can to end the victimization of children by child pornographers and to keep children from viewing inappropriate materials. But we must also ensure that any law Congress passes to address these problems will withstand First Amendment scrutiny.

Our children deserve laws that will work and last, rather than be stricken from the law books before they ever take effect. It is an enormous waste of time and resources to pass an unconstitutional law, and at the end of the day it does nothing to address the serious problems we are attempting to solve.

I have argued over and over again in the past 10 years that Congress must have due respect for the First Amendment, and I want to reiterate that again here today.

I think my record is pretty good in terms of identifying statutes that are of doubtful constitutionality. I will continue to speak up when I believe that Congress is not paying close enough attention to constitutional issues.

Protecting children from sexually explicit materials on the Internet is a particularly difficult problem. Many websites containing sexual content are located overseas, and U.S. legal prohibitions would simply drive more of those websites outside the United States beyond the reach of our laws. As a result, several respected commissions have concluded that Congress should take a different approach. We should, they say, encourage parental involvement, education about the use of the Internet and the voluntary use of filtering tools, which while not technologically perfect, can help parents manage their children's Internet experience. None of these approaches raise First Amendment concerns.

At least so far, Mr. Chairman, we do not have specific legislative proposals in front of us that are related to this hearing. The subject of this hearing suggests, however, that we may at some point be faced with proposals that go well beyond what Congress can constitutionally undertake. I again say I hope we will not repeat our mistakes.

But with that, I thank you, Mr. Chairman, for the time, and I welcome our witnesses, and I look forward to hearing our witnesses' testimony.

Thank you, Mr. Chairman.

Chairman BROWNBACK. Thank you. I hope, if we are able to get to legislation, you will help us in the drafting of it. I did not think you would get there on the campaign finance bill, but you made it in front of the Supreme Court and cleared it on First Amendment,

so maybe you can help me on this and where we can thread the needle right to make it through.

Senator FEINGOLD. I will help you on this one more than the one yesterday.

[Laughter.]

Senator BROWNBACK. That is not a high bar, Senator, on that one.

[Laughter.]

Senator BROWNBACK. Senator Hatch.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman.

I want to welcome all of you witnesses here today. It means a lot to us that you are willing to testify.

I first introduced legislation to restrict dissemination of obscene material in the 95th Congress during my first year in the Senate, and that was before the Internet even existed, some people say. What was the problem then has really become a crisis today, and ending in the right place requires starting in the right place. Pornography and obscenity present a problem of harm, not an issue of taste. Let me repeat that because we have to be on the right road to get where we need to go: pornography and obscenity present a problem of harm, not an issue of taste.

The days are long gone when concerns about the impact of pornography consumption can be dismissed with clichés and jokes about the fundamentalist prudes imposing Victorian values. Actually, that attitude reflects real ignorance about the Victorians, but that discussion might be for a different hearing.

[Laughter.]

Senator HATCH. Whether it is high-fat foods, secondhand smoke or hard-core pornography, what we consume affects all of us. Pornography affects both consumers and our culture. Surveys, Government commissions, clinical research and anecdotal evidence have long confirmed that pornography consumption correlates with a range of negative outcomes. Its effects are protracted, progressive and profound. Witnesses testifying today will go into more detail about the evidence for how pornography harms consumers.

The evidence for such harm was accumulating years ago at a time when the methods for producing, marketing and distributing porn were very well defined and somewhat stable. We now have the Internet, the most pervasive and anonymous medium ever devised by human beings. Pervasiveness and anonymity magnify the effect of pornography consumption on the consumer.

One of the witnesses today has written a book titled "Pornified: How Pornography is Transforming Our Lives, Our Relationships, Our Families." A review of Ms. Paul's book appearing in the September 25th, 2005 issue of the San Francisco Chronicle said it shows that to discuss porn today is to discuss Internet porn.

Another of our witnesses testifying today, and I am very happy that she is here, is Jill Manning, who comes from my own home State of Utah. She is doing her doctoral work specifically on the unique and devastating effects of Internet pornography. And I am proud to have you here, and will read your testimony.

In addition, the pervasiveness and anonymity of the Internet expand the population of pornography consumers to include children. Let me be clear. The problem is not the Internet, the problem is pornography. But we must take seriously the unique and powerful ways the Internet can be used for evil, rather than for good. In addition to affecting consumers, pornography affects the culture. Cultural critic, Malcolm Mugridge, observed more than 25 years ago that America is more sex-ridden than any country in world history.

Has the situation improved since then? Today as we head into the holiday season, obtaining the catalog of certain clothing companies will require a photo ID. A new survey by the Kaiser Family Foundation found that the number of scenes with sexual content on television has doubled in less than a decade. The highest concentration of sexual scenes is in shows that are most popular with teenagers. Someone will no doubt haul out the old argument that the television merely reflects but does not influence reality. The same Kaiser survey found that the percentage of so-called reality shows with sexual scenes is significantly lower than any other type of show. The percentage of reality shows with sexual scenes is less than half that for talk shows and less than one third that for drama shows or situation comedies.

In 2001, Esquire Magazine published a long feature on what it called the “pornification”—I can hardly pronounce it—“of the American girl.” Pornification. There should be no need to invent such a word.

Mr. Chairman, it is not possible rationally to argue any more that this is solely a matter of personal taste. It is a problem of harm, harm to individuals, to relationships and families, harms to families, harms to communities, and of course, to children.

As a result, legislators must evaluate whether we have a responsibility to act. We all believe in the freedom of speech, no question about it. Mr. Chairman, you and I swore an oath to preserve and protect the Constitution, including the First Amendment, but the First Amendment is not an altar on which we must sacrifice our children, our families, our communities and our cultures.

I want to thank you, Mr. Chairman, for holding this hearing, you and Senator Feingold for your work in this area. I want to thank you for the chance to participate in this important discussion and to hear from the distinguished panel of witnesses that you have assembled.

I really welcome you all here, appreciate you being here. I have got other commitments that I have to keep at this time, but I wanted to come over and make those points and welcome you all, and I certainly will pay very strict attention to what you all have to say.

Thank you so much, Mr. Chairman.

Chairman BROWNBACK. Thank you, Senator Hatch. I want to recognize your ground-breaking work in this field. For some period of time you have been here and on this for a long period of time. I wish we had had it solved by this point in time, but perhaps with Senator Feingold’s help we are going to get it solved this time around, and I hope we can, and I hope we can work on that.

Ms. Paul, I was very struck by the summation of your book that I read in the San Francisco Chronicle. I have heard it talked about

in different places. It looks like you have done a lot of work studying the pornification of the society, and I look forward to your testimony.

We will run the time clock at, why do we not run it at 6 minutes just to give you an idea of how long you are going. I would like for you to hold it around that as much as possible so we can get a chance to do some questions, if I could ask that of each of the witnesses.

Ms. Paul.

STATEMENT OF PAMELA PAUL, AUTHOR, NEW YORK, NEW YORK

Ms. PAUL. Senator Brownback, Senator Feingold, and Senator Hatch, thank you so much for the opportunity to participate in this hearing. I have to say I do not think I ever imagined I would be testifying in front of Congress about pornography of all things, but after writing a story for Time Magazine about pornography's effects, I was compelled by the seriousness of what I uncovered to write a book on the subject. That book, "Pornified: How Pornography is Transforming Our Lives, Our Relationships and Our Families," was published in September of this year.

As I hope will be understandable, I am going to refrain from using much of the graphic detail in this testimony that I document in my book, which will necessarily not give a complete picture of the damage that pornography does, but for those who wish to get a more complete and disturbing understanding of the impact pornography has, I am submitting my book along with this testimony.

In researching my book I sought answers to some very simple questions. Who uses pornography and why? How does pornography affect people? Will looking at online pornography at age 9 affect boys and girls when they reach sexual maturity? What is the impact of a pornified culture on relationships and on society as a whole?

To find out the private stories that people suspect but never hear, experience but rarely talk about, I interviewed more than 100 people. In addition, I commissioned the first nationally representative poll conducted by Harris Interactive to deal primarily with pornography. It is the first poll to ask such questions as: Does pornography improve or harm the sex lives of those who look at it? Is using pornography cheating? And how does pornography affect children who view it?

When opponents of pornography talk about the ways in which pornography affects people, they often talk about how pornography hurts women. But this leaves out an important point: pornography is also harmful to the men who use it. Men told me they found themselves wasting countless hours looking at pornography on their televisions and DVDs, and especially online. They looked at things they would have once considered appalling, bestiality, group sex, hard core S&M, genital torture, child pornography. They found the way they looked at women in real life warping to fit their fantasies that they consumed on screen.

It was not only their sex lives that suffered. Pornography's effects rippled out, touching all aspects of their existence. Their relationships soured. They had trouble relating to women as individual

human beings. They worried about the way they saw their daughters and girls their daughters' age. Their work lives became interrupted, their hobbies tossed aside, their family lives disrupted. Some men even lost jobs, wives and children.

Men tell women that their consumption of pornography is natural and normal, that if a woman does not like it, she is controlling, insecure, uptight, petty. But for many wives and girlfriends it becomes clear that the type of pornography men are into is all about men's needs, about what they want, not about their women or their relationships or their families. Not only does pornography dictate how women are supposed to look, it skews expectations of how they should act. Men absorb these ideals and women internalize them.

According to the "Pornified"/Harris poll, 6 in 10 women believe pornography affects how men expect them to look and behave, and it quite simply changes men's behavior. Where does he get the time? Already families, particularly dual-income couples, complain about how little time they have for their spouses and family. Imagine the toll that devoting 5 or so hours a week to pornography takes on family life, meals that could have been prepared and eaten together, homework that could have been poured over. Imagine the anxiety and tension caused to a mother who knows her husband is looking at online pornography, while his son is desperate for his father's company.

That so many men consider pornography a private matter, hidden or downplayed, necessarily creates distance with wives and girlfriends. According to Mark Schwartz at the Masters and Johnson Clinic, no matter how you look at it, pornography is always a sign of disconnection. In his research he has seen a whole new epidemic, largely related to the Internet, of people using pornography to disconnect from their loved ones.

At the 2003 meeting of the American Academy of Matrimonial Lawyers, as Senator Brownback mentioned, the attendees noticed a startling trend, nearly two-thirds of the attorneys present witnessed a sudden rise in divorces related to the Internet. Six in 10 were the result of a spouse looking at excessive amounts of pornography online. According to the association's president, 8 years ago pornography played almost no role in divorces in this country. Today there are a significant number of cases where it plays a definite part in marriages breaking up.

Of course, many mothers and fathers, even those who use pornography themselves, are particularly disturbed by the idea that their children will look at pornography. Make no mistake, experts say there is no way parents can prevent their children from looking at pornography at a young age, as young as 6- to 2-year-olds are now using Internet pornography, according to Nielsen/Net Ratings. Even if a parent uses a filtering program, children are likely to outmaneuver the software or see pornography at their local library or a friend's house or in school. Statistics show that about half if not all teenagers are exposed to pornography in one way or another. A 2004 study by Columbia University, found that 11.5 million teenagers have friends who regularly view Internet pornography and download it.

Psychotherapists and counselors across the country attest to the popularity of pornography among preadolescents. Pornography is integrated into teenage popular culture. Video game culture, for example, exalts the pornographic. One 2004 video game, "The Guy Game," features women exposing their breasts when they answer questions wrong in a trivia contest. The game does not even get an adults-only rating. Pornography is so often tied into video game culture and insinuates itself even into nonpornographic areas of the Web, it is very hard for a 12-year-old to avoid. Masters and Johnson's Clinical Director, Mark Schwartz, has seen 14- and 15-year-old boys addicted to pornography. It is awful to see the effect it has on them.

Touring this country to promote my book I heard again and again from concerned parents. "I know my 14-year-old son is looking at extreme hard-core pornography, but what can I do about it? He tells me he needs the computer for schoolwork." I have a 10-year-old daughter. I do not even want to think about what boys her age are learning about the opposite sex online.

A pediatric nurse told me there was an incident in her practice in which toddlers acted out moves from a pornographic movie. A day's worth of nationwide headlines inevitably brings up stories of children encountering pornography at the library, child pornography arrests and school incidents in which teachers are caught looking at pornography on computers during school hours. It is terrible enough that adults are suffering the consequences of a pornified culture, but we must think about the kind of world we are introducing to our children.

Certainly everyone, liberals and conservatives, Democrats and Republicans, can agree with the statement, "It was not like this when we were kids." And I cannot imagine anyone would have that thought without simultaneously experiencing a profound sense of fear and loss.

Thank you.

[The prepared statement of Ms. Paul appears as a submission for the record.]

Chairman BROWNBACK. That is powerful testimony. I look forward to questions and answers.

Dean Smolla, I hope I said your name correctly.

Mr. SMOLLA. Yes, Senator, you did. Thank you.

Chairman BROWNBACK. Glad to have you here.

**STATEMENT OF RODNEY A. SMOLLA, DEAN, UNIVERSITY OF
RICHMOND SCHOOL OF LAW, RICHMOND, VIRGINIA**

Mr. SMOLLA. Thank you.

I know the focus of this hearing is not on constitutional law as such, but on the nature of the harms associated with sexually explicit material. What I want to do is focus on the extent to which, as you think about possible legislation, you are permitted under existing constitutional doctrine to take that harm, which is undisputed, and use it as the predicate for justifying legislation, and the extent to which you are not, the extent to which existing First Amendment doctrine says while that harm may exist, you cannot make use of that to justify this particular type of legislation.

The first thing I want to do is just talk about a habit that all of us have, I have and most of us have, in referring to this area. We will use a word like, a phrase like “sexually explicit,” or we will talk about pornography or porn, or as I often do, pornography and obscenity. And I think all three Senators probably use those types of phrases as a compound, and it is natural, we all do.

But First Amendment doctrine is more precise, and First Amendment doctrine takes the vast array of sexually explicit material that we know exists ubiquitously on the Internet. It exists on satellite television, cable television and so on. And it draws a sharp distinction under existing doctrine. Between that sexually explicit material that is legally obscene, which is really the only true First Amendment term of art, and that which is lewd or pornographic or sexually explicit, but does it make the three-part test of *Miller v. California*?

The first important thing for you to think about is that the probability is that vast quantities of what is now on satellite, cable and the Internet, already meet the *Miller* standard. That is to say, someplace in some locality under community standards it can already be prosecuted, because it would already satisfy the *Miller* standard.

So one sort of common sense thing to keep in mind is this may not be a matter of needing new legislation, it may simply be a matter of making the decision at the local level, the State level or the Federal level, to put more resources into prosecution under the *Miller* standard, which you are always free to do.

More importantly, I think, what I would like to do is address this question: to what extent can you go beyond *Miller*? Are there pockets of this issue that you can address that allow you to pass legislation to get at material that is protected under the *Miller* standard? And the answer is, that if you want to go after this material there is some good news and bad news. The good news—and this is conjured up by Senator Feingold’s remarks—is that the Supreme Court has already said that children are a special case, really in two senses.

First of all, you can use filtering and filtering technology as a way of contending with this problem. That comes preapproved from the Supreme Court of the United States. It means if you put all of the various decisions of the last 7 or 8 years together, that some combination of what parents do in the home and what libraries can do, which the Supreme Court said is permissible in the American Libraries case, that is one way of contending with it. And of course, there is no protection for trafficking in true child pornography. That is to say, when children are actors that are part of the presentation, that is a heinous exploitation of children and there is nothing whatsoever in the Constitution standing between efforts by Congress to bolster that effort.

My last point, however, is the sort of bad news, if you will, if you want to aggressively go after this material under First Amendment doctrine. I would characterize it as having two important points. First of all, you cannot simply listen to evidence, as credible and convincing as I am sure it will be, that there are harms associated with the sexually explicit material, and then label those harms compelling governmental interest, and use that device to say, we

can outlaw material protected under *Miller*, but nevertheless causing trouble in our society because we can meet the strict scrutiny test under the First Amendment and justify it by compelling governmental interest. That is not existing First Amendment doctrine.

Rather, existing First Amendment doctrine says when you have a specific issue that you are dealing with, incitement to riot, threats to violence, libel, prior restraint, obscenity—and there is a specific First Amendment test that sets forth existing, clear doctrines for dealing with that, that displaces the strict scrutiny test. The reason for that, the reason that is not a bad constitutional principle, is that there is a tremendous temptation for us to move against offensive speech of all kind, flag burning, speech that seems to promote terrorist ideals that we do not agree with, sexually explicit speech. The whole history of this country is wrapped up in the natural tendency that all of us have to know evil speech and to want to legislate against it. And the reason we have these very specific doctrines with these very demanding standards like *Miller*, is to prevent us from yielding to that temptation, and then attempting to justify it by saying, “Well, there is a compelling interest to do it.” The Supreme Court said that is not the way you are allowed to go. You should not feel bad about that as a constitutional constraint because as I said at the beginning, you have the tools already to deal with the problem addressing children, and to deal with material that is already obscene under *Miller v. California*, which is probably a large amount of material if there was the willpower and the social resources to go after it.

Thank you, Senators.

[The prepared statement of Mr. Smolla appears as a submission for the record.]

Chairman BROWNBACK. Thank you very much, Dean Smolla. That was very good and very succinct, and I will look forward to some questions to probe a little bit further with you what particularly we might be able to do on Internet type items.

Ms. Manning.

**STATEMENT OF JILL C. MANNING, SOCIAL SCIENCE FELLOW,
HERITAGE FOUNDATION, WASHINGTON, D.C., AND SOCIOLOGIST,
BRIGHAM YOUNG UNIVERSITY, PROVO, UTAH**

Ms. MANNING. Thank you, Senator Brownback, Senator Feingold and Senator Hatch. I appreciate this opportunity to address you today.

Since the advent of the Internet, the pornography industry has profited from an unprecedented proximity to the home, work and school environments. Consequently, couples, families and individuals of all ages are being impacted by pornography in new and often devastating ways.

Although many parents work diligently to protect their family from sexually explicit material, research funded by Congress has shown Internet pornography to be “very intrusive.” Additionally, we know that a variety of fraudulent, illegal and unethical practices are used to attract new customers and eroticize attitudes that undermine public health and safety. This profit-driven assault jeopardizes the well-being of our youth and violates the privacy of those who wish not to be exposed.

Leading experts in the field of sexual addictions contend online sexual activity is “a hidden public health hazard exploding, in part because very few are recognizing it as such or taking it seriously.”

Research reveals many systemic effects of Internet pornography that are undermining an already vulnerable culture of marriage and family. Even more disturbing is the fact that the first Internet generations have not reached full maturity, so the upper limits of this impact have yet to be realized. Furthermore, the numerous negative effects research point to are extremely difficult, if not impossible, for individual citizens and families to combat on their own.

This testimony is not rooted in anecdotal accounts or personal views, but rather, in peer-reviewed findings in published journal articles, academic journal articles. I have submitted a review of this research to the Committee and request that it be included in the record.

Chairman BROWNBACK. Without objection.

Ms. MANNING. The marital relationship is a logical point of impact to examine because it is the foundational family unit, and a sexual union easily destabilized by sexual influences outside the marital contract. Moreover, research indicates the majority of Internet users are married, and the majority seeking help for problematic sexual behavior are married, heterosexual males. The research indicates pornography consumption is associated with the following six trends, among others:

1. Increased marital distress and risk of separation and divorce;
2. Decreased marital intimacy and sexual satisfaction;
3. Infidelity;
4. Increased appetite for more graphic types of pornography and sexual activity associated with abusive, illegal and unsafe practices;
5. Devaluation of monogamy, marriage and child rearing; and
6. An increasing number of people struggling with compulsive and addictive sexual behavior.

These trends reflect a cluster of symptoms which undermine the foundation upon which successful marriages and families are established.

While the marital bond may be the most vulnerable relationship to Internet pornography, children and adolescents are by far the most vulnerable audience. When a child lives in a home where an adult is consuming pornography, he or she encounters the following four risks:

1. Decreased parental time and attention;
2. Increased risk of encountering pornographic material themselves;
3. Increase risk of parental separation and divorce; and
4. Increased risk of parental job loss and financial strain.

When a child or adolescent is directly exposed, the following effects have been documented:

1. Lasting negative or traumatic emotional responses;
2. Earlier onset of first sexual intercourse, thereby increasing the risk of STDs over the lifespan;

3. The belief that superior sexual satisfaction is attainable without having affection for one's partner, thereby reinforcing the commoditization of sex and the objectification of humans;

4. The belief that being married or having a family are unattractive prospects;

5. Increased risk for developing sexual compulsions and addictive behavior;

6. Increased risk of exposure to incorrect information about human sexuality long before a minor is able to process and contextualize this information in the ways an adult brain could; and

7. Overestimating the prevalence of less common practices such as group sex, bestiality and sadomasochistic activity.

Because the United States is ranked among the top producers and consumers of pornography globally, the U.S. Government has a unique opportunity to take a lead in addressing this issue and the related harm. This leadership could unfold in a variety of ways. For example, educating the public about the risks of pornography use, similar to how we do with smoking or other drugs; supporting research that examines aspects of Internet pornography currently unknown; allocating resources to enforce laws already in place; and last, legally implement technological solutions that separate Internet content, allowing consumers to choose the type of legal content they wish to have access to.

In closing, I am convinced Internet pornography is grooming young generations of Americans in such a way that their chances of enjoying healthy and enduring relationships are handicapped. I hope this Committee will carefully consider measures that will reduce the harm associated with Internet pornography.

I thank the Committee for this opportunity to testify and welcome your questions.

[The prepared statement of Ms. Manning appears as a submission for the record.]

Chairman BROWNBACK. Thank you, Ms. Manning. Succinct testimony.

Ms. Harris.

STATEMENT OF LESLIE HARRIS, SENIOR CONSULTANT AND EXECUTIVE DIRECTOR DESIGNEE, CENTER FOR DEMOCRACY AND TECHNOLOGY, WASHINGTON, D.C.

Ms. HARRIS. Mr. Chairman, Senator Feingold, Senator Hatch, thank you for permitting the Center for Democracy and Technology to testify today.

CDT is a nonprofit public interest organization that was founded in 1994 in the early days of the Internet to promote democratic values and individual liberties in a digital age. We are guided by a vision of the Internet as open, global, decentralized, and most important for our purposes, user controlled.

A discussion of pornography inevitably raises a question about the availability of content on the Internet and how to best achieve the important goal of protecting children from such material.

As Professor Smolla has explained, some of this material that is obscene, that is child pornography, that is illegal, can be pros-

ecuted, and indeed, in the Communications Decency Act, the only surviving provision in that Act directly relates to obscenity.

The more difficult question perhaps is how to deal with material that is constitutionally protected, and CDT has long cautioned against overreaching laws which ultimately prove unconstitutional and fail to provide any meaningful protection to children. At the same time, the organization has been on the forefront of efforts to use new technologies to empower parents to guide their children's online experience. We took a lead role in creating GetNetWise, a user friendly resource that was created by the Internet Education Fund, that helps parents be no more than one click away from all the tools and resources that they need to make informed decisions about their children's Internet experience. And in the last year that site has over 200,000 unique visitors.

The President of our organization, Jerry Berman, served on the COPA Commission. That Commission was mandated as part of the Children's Online Protection Act. One of two blue ribbon panels—the other being a study this Congress mandated at the National Academy of Science led by former Attorney General Richard Thornburgh—directed to investigate how to best protect children online.

I want to briefly review the findings and lessons learned from those two panels. Both were panels of prominent people with diverse expertise from across the political spectrum, and both concluded that the most effective way to protect children online is through a combination of education for both parents and children, parental involvement, and choice enabled by filtering and technology tools, a strategy commonly known as user empowerment.

Those two studies, the COPA Commission was specifically asked to identify technological methods or other tools if any to help reduce access to minors to material that was harmful to minors. In the National Academy of Science study, which was a longer and deeper study, was a study of computer-based technologies and other approaches to the problem of availability of pornographic materials to children on the Internet. That study was more than two years in the making and it was released. The study, I believe, was entitled "Youth, Pornography and the Internet" in May 2002. I ask that that study be put in the record.

Chairman BROWNBACK. Without objection.

Ms. HARRIS. The key conclusions of the two reports are strikingly similar. First—and I think this is critical in terms of thinking about policymaking—that the global nature of the Internet, that criminal laws and other direct regulation of content that is inappropriate for minors, is likely to be ineffective; and second, that education and parental empowerment with filtering and other technology tools are far more effective than criminal law.

What I am saying here is that technology can be part of the solution, not just part of the problem. Both reports found that most of the commercial websites that are offering sexually explicit material are located outside the United States, and I think those numbers have grown in the time since this study was published. The National Academy concluded, and I will quote here, "The primary reliance on a regulatory approach is unwise."

Both reports found filtering and blocking technologies are more effective for protecting children. Both believe that “the most important finding”—and I quote the Thornburgh Committee here—“of the Committee is that developing in children and youth an ethic of responsible choice and skills for appropriate behavior is foundational for all efforts to protect them.” And also that technology tools, I quote, “such as filters, can provide parents and other responsible adults with additional choices as to how best fulfill their responsibilities.”

And critically, the Thornburgh Report suggested that one has to look beyond criminal laws for Government and public policy actions that might protect children, including concrete governmental action to promote Internet media literacy, educational strategies and support of parents’ voluntary efforts to employ technological solutions.

Importantly, both studies were endorsing the use of filters and empowerment technology by end users, parents, care givers, not by governments or third party intermediaries by mandates. As these studies acknowledge, these tools are imprecise and often overbroad, often block illegal and constitutionally protected material at the same time, but in the hands of families these are the least restrictive means of furthering the Government’s interest in shielding children. In the hands of Government they quickly become censorship.

We do have some new challenges, and one of those new challenges is plainly convergence. As the Internet begins to converge with technologies like cable television, cellular phone, MP3 players and to provide a wide range of content across platforms, we do have new questions arising. At the same time the tools are themselves evolving to meet those challenges. Just this week, CTIA, the trade association for the wireless industry, announced new wireless content guidelines and a commitment to implement Internet content access control technologies that can empower parents to control the types of content that can be accessed over wireless phones and other devices. So if content is moving to technologies, parental empowerment technologies are spreading with it.

There are new challenges. One of those new challenges is ratings, a concern that multiple ratings of different kinds of content on different kinds of platforms start to converge, that that will cause confusion. Another concern is unrated material as more and more people add their content to the Web, it may become more difficult for user empowerment technologies to be able to access and make decisions about what to block and what not to block. The Internet Education Fund is beginning a new initiative to try to rationalize those differing rating systems and user empowerment tools, and work with industry and other stakeholders to explore ways to ensure that the rating schemes easily map to new non-traditional media outlets, and that content creators of all type encode their material in a way that can be accessed by user empowerment tools.

Chairman BROWNBACK. Ms. Harris, if we could wrap the testimony up, I would appreciate that.

Ms. HARRIS. I am going to stop right now.

I look forward to working with the Committee on these and other measures that will support the user empowerment approach to protecting kids online.

[The prepared statement of Ms. Harris appears as a submission for the record.]

Chairman BROWNBACK. Thank you very much.

Mr. Whidden.

STATEMENT OF RICHARD R. WHIDDEN, JR., EXECUTIVE DIRECTOR AND SENIOR COUNSEL, NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, FAIRFAX, VIRGINIA

Mr. WHIDDEN. Senator Brownback, Senator Feingold, good afternoon. My name is Richard Whidden, and I am the Executive Director and Senior Counsel for the National Law Center for Children and Families. I am honored to be called to testify today. I will discuss briefly how Congress, and in appropriate cases, the States, have compelling interests in regulating the material that we are discussing today.

I should preface my comments by outlining the well-established interests that the State has in regulating obscenity. In the Supreme Court's prior decision, *Paris Adult Theater 1*, the Supreme Court held that obscene material does not acquire immunity from State regulation simply because it is exhibited to consenting adults. The Court discussed in that case at length the numerous State interests, including interests of the public and the quality of life, the tone of commerce in the great city centers, public safety that justify regulation in addition to the States' interest in protecting children and what was referred to as the unwilling adult viewer.

The Court in that case further held that the obvious prurient nature of the material was sufficient basis in and of itself to determine whether the material was obscene, so that expert testimony in the prosecution of these cases was not required to prove obscenity.

This decision had the effect of allowing Government to regulate obscenity without having to rely upon onerous levels of review in every investigation or prosecution commenced by the Government.

It is further that the Government has a compelling interest in protecting children from exposure to sexually oriented materials. In 1968, the Supreme Court in *Ginsberg v. New York* upheld a New York law prohibiting the sale of sexually explicit materials to those under 18 regardless of whether or not that material would be considered obscene for adults. The Court opined, and I quote from the decision, "The well-being of its children is of course a subject within the State's constitutional power to regulate." It also found that the State had an interest in creating law supporting parents, teachers and others with a responsibility for children's well being, as well as an independent interest in maintaining the well being of youth.

According to the Court in *Ginsberg*, the quantum of harm required to justify State action was minimal, so long as the Government demonstrated that the material was harmful to minors, and therefore, not constitutionally protected expression. In support of its conclusion, the Court cited studies prior to 1968 demonstrating that pornography was harmful to minors.

It appears beyond doubt that the harms of obscenity recognized by the Court in *Ginsberg* decades ago has been greatly amplified in today's environment. When *Ginsberg* was decided in 1968, the Internet was a figment of science fiction writers' imaginations, persons who sought to obtain obscene materials could obtain it in a relatively few places. Today obscene materials are easily accessible to us, and therefore, to our children, on our home computers, through those computers in classroom, their wireless technology devices as that develops and converges in the future, as Ms. Harris alluded to.

Obscene materials are no longer limited to the proverbial plain brown wrapper. The accessibility, affordability and anonymity of the Internet, I submit, in my opinion, has had an adverse effect on our children and families in addition to the great things that the Internet has provided.

Congress has taken several steps in the previous years to address these harms, and they have been alluded to previously. The Children's Internet Protection Act, otherwise known as CIPA, was upheld as a legitimate exercise of Federal funding discretion. Specifically, the Court held that Congress could fund library Internet access on the condition that libraries adopt Internet filtering policies.

On a preliminary injunction in the *Ashcroft v. ACLU* case decided in 2004, the Court held the Child Online Protection Act unconstitutional because of the record before the Court at that time did not show it as the least restrictive alternative under First Amendment analysis. However, it is critical to note that the Court in that case specifically said that Congress could regulate the Internet to prevent minors from gaining access to harmful materials. Indeed, that case is now back on remand to the lower court for further findings with respect to the technology, which has changed since that original court case was decided.

It has also been established that the law may address the methods of distribution of pornography. Justice Sandra Day O'Connor, several years ago, wrote about the regulation of Internet pornography in a concurring and dissenting opinion, in a way that is analogous to the zoning laws that local communities can adopt, allowing for the segregation, if you will, of harmful material. Specifically in those cases, Government may address the secondary impacts and secondary effects of pornography on children and family in the time, place and manner of that distribution. However, the Internet that Justice O'Connor referred to was the relatively nascent Internet of 1997. In her discussion, she lamented the lack of technology available at that time to empower parents to protect their children, suggesting that technology could provide that ability in the future. Investigating technological capabilities and encouraging the development of new technologies that can help parents should be encouraged by Congress and this Committee.

I submit Congress and the States should consider the following:

First, Government should encourage research concerning the effects of pornography on children and families, not only what has been alluded to here, but also what Senator Brownback alluded to earlier on research on this material and the effects of it on the human brain and its addictive nature, should be continued;

Second, Government should foster the development of technological answers that will allow families to adequately protect their children while they use the Internet;

Third, Congress should create legislation which allows parents to hold illegal pornography distributors of illegal pornography responsible for harm done to children; and

Fourth, Government should create legislation that would aid in keeping sexual material away from sexual predators who utilize that material to groom victims for abuse.

I want to thank the Committee for this opportunity to testify today on this issue so important to families and society.

[The prepared statement of Mr. Whidden appears as a submission for the record.]

Chairman BROWNBACK. Thank you. Let us run the clock at 5 minutes and we will bounce back and forth here if that is okay with Senator Feingold.

Mr. Whidden, I want to ask you on that third point that you are suggesting here, you are suggesting by that that we establish a procedure where parents can sue pornography distributors for damages to their children?

Mr. WHIDDEN. An Act that was considered by Congress in the early 1990s would have provided for civil laws of action with respect to if a child was abused, for example, and there was shown to be a causative link between some pornography that the abuser saw, that potentially that the pornography distributor could be held liable in a civil action. That was considered by Congress I believe in the early 1990s. Such legislation should again be looked at and see if that is a viable option.

Chairman BROWNBACK. Dean Smolla, does that strike any First Amendment issues to you, just on first blush? Obviously you are just hearing about this.

Mr. SMOLLA. Sure. Well, you would have to first know whether the material that was the alleged cause of the abuse was constitutionally protected or not constitutionally protected. So if it were obscene material or if it were child pornography and was not constitutionally protected anyway, then creating a civil remedy for harms that flow from it would probably not violate the First Amendment. That is my initial reaction.

But if the material were soft-core pornography of the kind that would normally be protected, you would have major First Amendment difficulties, and it would be similar to attempts to go after a rap group because an explicit lyric causes someone to engage in a drive-by shooting, that sort of thing. That courts have been almost entirely unwilling to allow liability in that sort of situation.

Chairman BROWNBACK. But if it is material—and you have suggested that much of the material today would be prosecutable under *Miller*, so it would be any material that would be prosecutable under *Miller* you would think would be subject to civil exposure?

Mr. SMOLLA. If you can put someone in jail for the material, then by hypothesis you could have a civil remedy for harm that was caused by it, assuming you could, you know, satisfy ordinary principles of tort law and causation and so on. I do not see any con-

stitutional impediment to that if it is otherwise unprotected material.

Chairman BROWNBACK. Ms. Paul, you have been conducting a nationwide town hall meeting on this topic with your book. I am guessing you have done a lot of radio shows and different things. You talk about the effects of it, and when I read just the summary, as I said, it was just horrific, the things you were talking about, both you and Ms. Manning. You do not particularly recommend specific actions, and I realize that is not your role and that is not why we have you here. But have you heard any particular ones as you have been out across the country that strike you as making good sense of something we could do on this topic?

Ms. PAUL. I think you are right, I will defer to Ms. Manning and to Mr. Whidden on that question. But I would say that those who often defend the right of pornography as free speech, often refer to pornography as sexually educational materials, and I think that that is a disingenuous position to take considering the nature of pornography that is out there and the kind of lessons that that pornography imparts, particularly to young people. So I think that the kind of free speech that could be fostered certainly is awareness and education about the harmful effects of pornography.

In this country I think prior to recent efforts, from films like "Supersize Me" and books like "Fast Food Nation," people looked at a Chicken McNugget, for example, and they thought, well, you know, it is probably not that good for me, but they did not know everything, all the harmful ingredients in a Chicken McNugget and they could then make a more informed decision about whether to consume it.

I think that in this country we tend to look at pornography as harmless entertainment and that there is very little in terms of a public education campaign or anything in schools or in the culture overall that shows pornography really for what it is, and highlights the harmful effects that it has, and I think that is the kind of free speech that certainly should be encouraged.

Chairman BROWNBACK. So you would advocate really just a very strong public awareness campaign, of more books like your "Pornified" being out, and more discussion of this taking place across the country?

Ms. PAUL. Well, I certainly think it would be a start. I mean I think that, again, the public discourse in this country in popular culture particularly, tends to avoid any criticism of pornography, and any criticism that is out there is immediately written off, as Senator Hatch said earlier, as something that is prudish or uptight or somehow irrelevant, and I think that that really ignores the reality of what pornography is, and how much it affects those who use it and those around people who use it. So I wrote my book—obviously as a journalist I am very interested in free speech, and I wrote my book in order to get that message out there and to really show the harm that pornography does.

Chairman BROWNBACK. What has been the reception for your book?

Ms. PAUL. Well, obviously, there has been some very nice reception, particularly among people who have suffered at the hands of pornography, that there is some kind of recognition that is finally

get out there of the problem, and from those who become addicted or compulsive about pornography, they are particularly grateful that this message has gotten a little bit mainstream attention.

I would say that it has been disappointing to me that there has been a very harsh critical reaction from people who immediately assume, again, that I am somehow going to call for a ban on pornography or impinge on free speech, and the criticisms, again, take the form of what has traditionally been the pornographer's response, which is ad hominem attacks. Certainly I have been called a prude, a reactionary, or some kind of sexually unsatisfied person who is just out to condemn men. It is unfortunate, but that—

Chairman BROWNBACK. What have people that are addicted or have been addicted to pornography say to you?

Ms. PAUL. For many of them it is difficult to read about it, obviously. I note in the book that I used a lot of the language that men who use pornography tend to employ and describe some of the pornography, and obviously, that is very hard for someone who has a compulsive problem with pornography to look at. For them it is hard to even turn on the television. I mean you have Victoria's Secret prime time specials, that for them trigger a response similar to pornography and can tumble them back into it. So to read it is difficult.

But they have been tremendously grateful that the problem has been acknowledged. As you may well know, the question of whether pornography is addictive is still controversial in psychiatric circles and is not part of the DSM, and so they struggle with simply getting recognition that their problem is legitimate.

Chairman BROWNBACK. Ms. Manning, you had something to add?

Ms. MANNING. Yes. I have listened intently to discussions about freedom of speech and expression, and I need to enter into this hearing the view that this is not just a simple form and benign form of expression, but rather, a potentially addictive substance. And I believe the social science and neuroscience is gradually building the case for that to be well established.

As a practicing clinician that works with sex addicts, spouses of sex addicts, and currently just 2 days ago working with my teenager's group for porn addicts, I can tell you this is not a simply form of expression. One of the fundamental differences that make it so is people watch a movie, read a book, listen to music, but they masturbate to pornography, and in that difference you have a different stimulation to the brain. It has a fundamental difference physiologically on people with the neurotransmitters and hormones that are activated, approximately 14 of them, and in a split second, three-tenths of a second, we know that the material starts a chain reaction in the body. That is different than other forms of media. This acts very quickly, and there have been some experts that have even argued that in and of itself overrides informed consent when encountering this material.

When you work in the throes, in the trenches of people dealing with this on an out-of-control basis, I would respectfully disagree that filters and content watches are the way to go. One hundred percent of the sex addicts in my groups—and I have worked with close to 100 of them—the youth in the group that I work with, all of them have filters on their computers. We know from research

that there is a 12 percent increase in likelihood of using Internet porn for every one unit of computer knowledge. We have technologically savvy kids these days. Filters can be circumvented, re-routed, passwords broken. These are smart kids, and the industry is smart. Filters can lull us into having a false sense of security that this is protecting our families.

I meet with parents that are concerned weekly who are putting these things on their computers, and still this is an issue.

Chairman BROWNBACK. Thank you. I went way over my time.

So, Senator, please use yours freely.

Senator FEINGOLD. Thank you, Mr. Chairman.

Dean Smolla, thank you for being with us today. As I understand it there is a pretty stark analytical difference between how the First Amendment creates laws that limit the access of adults to sexually explicit content and those that limit the access of children to those materials. It seems obvious that materials that are appropriate for adults might not be something we want to expose children to. Can you go through the First Amendment distinction between these two scenarios and whether the compelling Government interest test, which you talked about some, has been applied differently depending on whether law regulates material for adults or for children?

Mr. SMOLLA. Senator, I think just to reiterate the basic framework that I went through earlier, there is actually a convergence between Mr. Whidden's testimony and mine in this sense. It is true that *Miller* and *Paris Adult Theater*, which are still the two cornerstone First Amendment decisions that govern this area, talked about the social harms that justify not giving obscene speech First Amendment protection. But then those cases struck the balance for us. Those cases said: That is the reason why we do not protect obscenity, now here is how you define "obscenity."

Much of the kind of thing that Ms. Manning is talking about is already reachable under the *Miller* standard. Presumably, no one wants to ban, for example, erotic material that is part of a serious artistic, or political, or religious or scientific presentation. That is one of the bulwarks of the *Miller* standard, that if there is serious redeeming value we do not treat just as pornography, we treat it as a serious form of expression.

If it is devoid of that, if it does not have serious value, and it appeals to the prurient interest, which does not mean much other than it is sexy, it is erotic, and it is patently offensive under local community standards, you can already go after that. The probability is that without changing one word of one law anywhere, if you doubled, tripled, multiplied ten-fold the prosecutorial efforts, you would see results. No doubt about it. That either means you take existing budgets, and prosecutors do not prosecute the crimes they are doing now and shift it over to efforts to go after obscene material, or legislative bodies appropriate more money to give them the tools to do it. The law does not need changing so much as the social will to go after it.

Children are a different matter, Senator, and that has been key to what many, many people have said, and I think there is agreement there. But again, I would submit that the tools are already there, the tools to deal with child pornography, the tools to deal

with predators are there legally. What you need are the resources to go after it.

Senator FEINGOLD. Ms. Harris, I have long been concerned about, as I indicated before, Congress passing laws with laudable goals but that have little chance of surviving constitutional challenge. As I said before, it is a waste of time and resources, yet it seems to be the road we have gone down time and time again. At the same time there is no question that we are dealing with difficult problems. So I was interested in your testimony pointing to well-respected commissions that have argued that instead of creating new crimes, which we have had such trouble trying to do, we might consider doing what we can to help support parental efforts to educate and empower themselves and their children regarding appropriate and safe Internet usage.

As technology advances, more and more tools such as filtering software are available to help parents and other responsible adults protect children, and there are numerous Web resources. Indeed the Supreme Court itself has suggested that this type of approach is constitutionally preferable.

From a practical and legal perspective, is this a better way to address these problems, particularly with regard to the Internet?

Ms. HARRIS. I think it is, and I think not only have these two commissions done serious research and come back with that conclusion, but were not taking those studies seriously. I think that in a 21st century environment the literacies for families about how to manage content on the Internet, how to control their children's Internet use, is not optional. Knowing how to do these things are not optional any more. And that a large part of agenda really needs to be moving people to becoming wise users of these resources.

And I continue to believe—I do understand that an individual child may be able to get around a filter. I mean we cannot do public policies for the single person who somehow can subvert those policies. But overall, we have these tools, they are getting better. We need to collectively make a commitment to make sure those tools travel with us as digital technologies converge. We have some very thorny questions to make those technologies work in a new environment, and we need to put some energy and time into that agenda, because ultimately it may be the only constitutional agenda that we have in this area.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman BROWNBACK. Ms. Manning, I want to pursue this a little further with you and start it with noting that there was an article released today stating that complaints about indecency and obscenity to the FCC have risen four-fold in the last quarter of this year, and the numbers have gone from 6,161 to 26,185 complaints to FCC. This is on top of the study that was cited by Senator Hatch about the substantial increase of sexual material on over-the-air broadcasts, because the FCC only regulates over-the-air public broadcast, radio, television. We will submit the article for the record.

I am curious from what you describe, when you say that somebody is addicted to this material, what happens when they see it? You are saying filters do not work because they know of some way to get around the filter. Is it triggered when they see something on

television, and then we are off to the races another way, or how does this work?

Ms. MANNING. It depends on the individual and the types of material that they are drawn to or tempted by. I agree with Dean Smolla that we tend to treat pornography as this one thing, and there is a range of categories within that. People that are drawn to child pornography may not necessarily be triggered by heterosexual content that they see, but there are triggers in the day-to-day world that we live in.

How the addiction works, in my view, and there is research to back this up, is that it tends to escalate over time, and we know that the Internet has rapidly increased the rate at which people can develop compulsive and addictive behaviors. As well, experts in that field know that the Internet has attracted users that may never have had a problem with pornography prior to this era, so the base of consumers is rapidly growing as well as female consumers. We now have a situation where up to 30 percent of consumers online are female. That was not the case years ago.

Chairman BROWNBACK. Thirty percent of pornography consumers online are female?

Ms. MANNING. Online. So we see escalation over time, greater tolerance to this material where they seek harder and coarser material over time. There is also withdrawal symptoms that can occur, insomnia, shaking, similar to what we see with withdrawals in other types of drug usage. That also leads to greater risk taking where these people are not using good judgment with jobs, family relationships. Many of my clients have lost multiple jobs, presidents of companies, high-level executives—

Chairman BROWNBACK. Of being addicted to pornography?

Ms. MANNING. Being addicted to pornography. This also brings in liability issues for corporations, where we know a good bulk of pornography is being consumed during the working day. That brings in sexual harassment questions into the workplace, decreased productivity, et cetera, et cetera. So the addictive elements of this, yes, there is not consensus on this in the entire mental health and medical community. However, for those of us that are working in this field, I must state that five, six years ago I was somewhat indifferent on this issue, and it was not until I started practicing clinically and seeing this devastation that I quickly became convinced this is not just being conditioned to be overly aroused by material.

There is an addictive quality to this that we need to be paying attention to, and that is a distinction in the freedom of speech arguments and debate that I think needs to catch up with the Internet era. This is a different debate than the previous era of magazines, film, that had still images or images that you could not interact with. This is highly interactive, powerful emotionally, loaded content that affects the brain very differently than still images.

Chairman BROWNBACK. Ms. Paul, I want to get you into this, on particularly the issue of marital relations. The data seem to be building pretty substantially that the pornography is negatively affecting a number of marriages in this country. It is coming from divorce lawyers, family law practitioners, others. Is that something you found consistent in your interview and survey?

Ms. PAUL. Yes, absolutely. I mean when you talk to men, for example, about their use of pornography, they will often openly admit that if they come home at the end of the day and they have a choice between having sexual relations with their wives or going online and masturbating to the computer, if they go to their wife, well, just practically speaking, they have to make sure that they have done all the chores around the house they were supposed to do. They need to have a half an hour conversation about what they did that day. It often takes a longer time for a relationship with a real person than it does to masturbate to the computer, and you are talking about an hour and a half, something that involves communicating, something that involves taking part in the family and in the household, versus 5 minutes to go online.

Well, a lot of men say, quite frankly, "I would rather just go online," and so—

Chairman BROWNBACK. They said that to you in the interviews that you did?

Ms. PAUL. Yes. "I would prefer to just go online. It is a lot easier. It is a lot less stressful. It is a lot more fulfilling in certain ways than to go and to be with my wife." What happens is you create a vicious cycle.

Now, I must state that every man, almost every man, would say unequivocally, "Well, of course sex is preferable with a real person than with a computer." That is in the abstract. But when it comes down to what they actually do, again, you get the cycle, well, it becomes a lot easier to go online to the computer. The more you do that, the less you are communicating with your wife, the less you are physically with your wife, and the wives notice this, and of course, they wonder, "Where is my husband? Why is he no longer interested in me?"

When a wife discovers that a man is looking at pornography, her first reaction is to feel betrayed. It feels like cheating even if it is not cheating in a legal sense. They feel that they have to compete with these women. How would you expect, say, a 45-year-old woman who has been married for 15 years and has 3 children, to compare herself with someone who is 20-years-old, surgically enhanced, airbrushed, and will online, in the pornography that is depicted online, do every single thing that the man would like her to do and behave in ways that she might not be comfortable with? It becomes extremely difficult for women to cope with that reality.

Chairman BROWNBACK. Thus leading to more difficulty in the relationship.

Ms. PAUL. Exactly.

Chairman BROWNBACK. And more divorce in its impact.

Ms. PAUL. Exactly. I think that, just to build on what Ms. Manning was saying, there is a slippery slope where we tend to look at the pornography addicts and say, okay, that is a small slice of the population, but we cannot apply everything, we cannot speak about that as if everyone is going to become addicted the same way we cannot talk about alcohol in the sense that everyone is going to become an alcoholic. But there are men who openly say that they would never have had a problem with pornography if it had not been for the Internet.

When I spoke with casual users, who were the majority of the people I interviewed, and asked them, "Do you think you ever could become addicted to pornography?" Most of them said they could. I do not think any of them would have said that before the Internet.

Chairman BROWNBACK. Dean Smolla, I want to bring you into this then, and I am trying to build a bit of a factual case for you. I am sure you have seen this coming. Ms. Manning talks about specific settings of her clients. Ms. Paul talks about the setting. You know the level of divorce, the divorce lawyers, family law practitioners saying this is clearly growing in its impact. I believe the case is documented and is building. You say we have to hit a strict scrutiny standard that is like saying the theater is burning to be able to get at any further limitation on this, I believe if I am catching you correctly. If I am not, correct me. But also address this question. Are we getting to the point of evidence that a court would be willing to say this is enormously harmful; it has met the standard of the society of legislators being able to legislate and address this because of the documentation of its harm in society?

Mr. SMOLLA. And I think that that is the heart of the matter, and my simple answer is no. So that you will not think that is the shrill, strident, free-speech answer, remember that the constitutional doctrine today, to put it very simply, divides the world between hard-core porn and soft-core. I mean if you just wanted to put it in simple language in terms of what *Miller v. California* means, that is the division.

And so if we have a kind of public health epidemic, if we have a new behavioral problem in the way that men and women relate, if there is an addictive quality to this because of the Internet that did not exist before, that does not change the constitutional standard. It may merely mean that we need more public health resources, more prosecutorial resources, more efforts under existing law.

The heart of my testimony is, most of what is causing the kinds of behavioral dysfunction that these witnesses are talking about, which I think is strong evidence, most of what is causing that could be prosecuted almost certainly under the *Miller* standard. We are not talking about episodes of "Sex and the City." We are not talking about the HBO series "Rome," where there is an explicit sexual scene, but it is obviously a portrayal of history. We are talking for the most part about pretty crude, straightforward hard-core material, that depending on the jurisdiction—and this is the federalism issue, the law is you have to go community by community—depending on the jurisdiction, almost certainly you could reach it if there was the willpower to put the energy into it.

I think, Senator, what I am saying is, if this is a public health problem of the nature that we are maybe beginning to perceive, then treat it as one and put the resources into that. Put the resources into counseling, into education and into existing criminal laws, and do not try to stretch the envelope of the First Amendment, where almost certainly, you just know almost certainly, you are going to get tremendous pushback from the courts.

Chairman BROWNBACK. I am more attracted to this idea of allowing civil actions to move forward if you want to multiply your resources.

Mr. SMOLLA. As an old plaintiff's lawyer, Senator, I can see a lot of people liking that.

Chairman BROWNBAC. I am singing to the choir here on that.

Mr. SMOLLA. Does that multiply your resources here?

Chairman BROWNBAC. It does.

Mr. SMOLLA. If the case is building as you are hearing.

Chairman BROWNBAC. This is the first hearing I have held on this topic, and it is not the first year I have been interested in it, because I have watched this develop and I have watched the evidence build on it, and we started sometime back on the Internet when these first started coming out because it seemed like the Internet really provided another whole venue here that we had not been used to. At first we were really raising more alarms to it than anything, but you are saying, well, I could see where your alarm could be accurate, but we do not have the evidence.

Now we are years into this thing, and it seems to me, not only do we have the evidence, it is massive in its overarching impact, and that it is very international in its basis because of the nature of how the Internet works.

Mr. SMOLLA. Senator, I think that just to quickly respond to the civil action idea, we have an analog, we have the law of libel which says that if you meet certain standards of causation, certain standards of intent, certain standards of First Amendment requirements that the material be false and defamatory and so on, a plaintiff can recover millions of dollars in damages for the harm to reputation and the emotion anguish caused by someone's libelous speech. Because once you meet the constitutional definition of "libel" and the requisite intent requirements, there is no First Amendment protection.

So by hypothesis—I mean one would want to research it and think it through and draft carefully—by hypothesis, if you limited the civil action to material that already satisfied the *Miller* standard, for example, or the child pornography standard governed by *Osborn v. Ohio*, if you had speech that already comes to you unprotected and you met standards of causation that would satisfy due process and so on, I see no constitutional impediment at the outset to doing it.

Chairman BROWNBAC. Do you support the Department of Justice's current efforts to increase prosecution in this field?

Mr. SMOLLA. Absolutely. What they have done is they have said this is already a crime. It is a crime we have the constitutional power to go after. We have made an executive branch decision that we should put more resources into it. There are crimes we do not prosecute because we do not care, and then the behaviors follow. If as a society we care about going after truly hard-core material, then it is a perfectly appropriate executive decision to go for it.

Chairman BROWNBAC. We are now getting reports of two types of pornography developing that then go into another subject I have worked on, of people, women being trafficked into the United States to do pornographic films, or of pornographic films being shot of women overseas, under age, and then the film brought back into here, which is probably the way the system is going to move to because it is far simpler to do that than to traffic the individuals into the country. I mean to me this is just one of the most vile things

to see and to hear about, particularly since we have got so much human trafficking taking place now. The third leading income source for organized crime globally is trafficking. Most of it is centered around the sexual industries, prostitution. I cannot imagine the profit-making motive if you associate it now around pornography, the money that can be involved in this.

How would you get at that nexus? Have any of you thought about that or have heard about this connection?

[No response.]

Chairman BROWNBACK. If any of you get a sense on it, this is one that I am hopeful that we are going to be able to prosecute aggressively to start off with under either the obscenity laws or under the trafficking laws, one way or the other.

I want to thank the panel very much for being here, and your testimony and your work on this. I want to encourage you to continue to write and publish on this. I do think one of the key things we need to do is to have that campaign, like you were talking about. That is first and foremost. This is a noisy society, and the best thing often you can do is really try to get enough noise level built up that people are aware this is a problem and I need to do something about it, or watch so I do not slip into it myself, or people around me. So I appreciate the efforts to write and to study on this, and I appreciate the constitutional warnings.

We have been around this track a couple of times trying to address it and have been overturned in court. So I am not trying to do, I do not want to do another action that is, okay, we go up and the court throws it out again. That is a futile activity and it does not serve anybody's interest. So we want to try to get it right.

The record will be left open for 7 days for submission of additional material that any of the individuals would like to submit. I will offer into the record now Ms. Paul's book, "Pornified," as well as Ms. Manning's article on the impact of Internet pornography on marriage and the family.

Again, I want thank you all for being here, and I want to thank you particularly for your work. I think that is a key area we need to get more people working in.

The hearing is adjourned.

[Whereupon, at 3:30 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

[Additional material is being retained in the Committee files.]

SUBMISSIONS FOR THE RECORD



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**Statement of Leslie Harris
Senior Consultant and Executive Director Designee
Center for Democracy & Technology**

**before the
Senate Committee on the Judiciary
Subcommittee on the Constitution,
Civil Rights and Property Rights**

**concerning
Protecting Children and Families
in the Age of Convergence**

November 10, 2005

Chairman Brownback, Ranking Member Feingold, and members of the Committee, thank you for permitting the Center for Democracy & Technology to testify today. I am Leslie Harris, a Senior Consultant and the incoming Executive Director of CDT.

CDT is a non-profit public interest organization founded in 1994 to promote democratic values and individual liberties in the digital age. CDT works for practical, real-world solutions that enhance free expression, privacy, and democratic participation. We are guided by our vision of the Internet as a uniquely open, global, decentralized, and user-controlled medium. We believe the Internet has unprecedented potential to promote democracy, by placing powerful communications technology in the hands of individuals and communities.

Although this hearing is not focused on the Internet, inevitably there will be discussion of online content, and we welcome the opportunity to address the important question of how best to achieve the goal of protecting children from inappropriate material on the Internet consistent with constitutional values and the growth and health of the Internet.

From its inception, CDT has played a leading role in policy debates on how to protect children from inappropriate material online. In Congress, we have cautioned against overreaching and ultimately unconstitutional laws that have failed to provide any meaningful protection to children. In the courts, we have led or supported legal challenges to those unconstitutional laws. As a member of the congressionally-created COPA Commission, CDT's

President Jerry Berman worked to evaluate the full range of approaches to protecting kids online, and joined the Commission's conclusion that filtering and other user empowerment tools (in the hands of parents) along with education, are the keys to protecting kids online

And perhaps most critically for this hearing, CDT has been at the forefront of industry and public interest efforts to support GetNetWise.org, a central user friendly resource, created by the Internet Education Foundation, that helps parent be "one click away" from the resources they need to make informed decisions about their families' use of the Internet. The site includes precautionary tips, recommended tools, short video tutorials and suggested actions to take to combat various cyber threats including kid's Internet safety and privacy. In the last year alone, the site has attracted over 200,000 unique visitors, and is widely recognized as a critical resource for parents looking for information on how best to protect their children online.¹ Recently, GetNetWise's video tutorials and tools were integrated into the Federal Trade Commission's On Guard Online site, the only federal government effort to support the online user empowerment recommended by the COPA and Thornburgh reports.²

In any consideration by Congress of the issues surrounding sexual content on the Internet, we believe that the starting point should be the two blue ribbon panels that Congress itself directed to investigate how best to protect children in the online environment. In my testimony today, I would like to briefly review the findings of those two blue ribbon panels, and discuss the lessons that Congress should take from those two studies. Both of those studies concluded that the most effective way to protect kids online is to combine education with the use of filtering and other technology tools to empower parents to decide what content their children should access. I will conclude my testimony with an overview of the latest efforts to make user empowerment tools more readily available as information and entertainment technologies converge.

The COPA Commission and the Thornburgh Committee Report

In the late 1990s, Congress initiated two different studies to assess how best to protect children online. As part of the Child Online Protection Act passed in 1998 ("COPA"),³ Congress established the "COPA Commission" to "identify technological or other methods, if any, to help reduce access by minors to material that is harmful to minors on the Internet."⁴ The Commission, which was comprised of eighteen commissioners from government, industry and advocacy groups, representing a wide variety of political affiliations,⁵ evaluated and rated

¹ <http://www.getnetwise.org>.

² <http://www.onguardonline.org>.

³ 47 U.S.C. § 231.

⁴ See COPA § 5(c), 47 U.S.C. § 231, note.

⁵ The members of the COPA Commission were Donald Telage, Network Solutions Inc. (Commission Chairman); Stephen Balkam, Internet Content Rating Association; John Bastian, Security Software Systems; Jerry Berman, Center for Democracy & Technology; Robert C. Cotner, Evesta.com (resigned); Arthur H. DeRosier, Jr., Rocky Mountain College; J. Robert Flores, National Law Center for Children and Families; Albert F. Ganier III, Education Networks of America; Michael E. Horowitz, Department of Justice; Donna

protective technologies based upon various factors including their effectiveness and implications for First Amendment values. The Commission issued a final report in October 2000.⁶

Wholly independent of the COPA Commission, in November 1998, Congress instructed the National Academy of Sciences to undertake a study of "computer-based technologies and other approaches to the problem of the availability of pornographic material to children on the Internet."⁷ More than two years in the making, the National Academy released its study – entitled "Youth, Pornography, and the Internet" – in May 2002.⁸

The committee that prepared the National Academy of Science report was chaired by former U.S. Attorney General Richard Thornburgh, and was composed of a diverse group of people including individuals with expertise in constitutional law, law enforcement, libraries and library science, information retrieval and representation, developmental and social psychology, Internet and other information technologies, ethics, and education.⁹ Over the course of its two years of study and analysis, the committee received extensive expert testimony, and conducted numerous meetings, plenary sessions, workshops, and site visits.¹⁰

These two reports represent the best available analysis of how to protect children online. They were prepared by blue ribbon panels that included participants from a diversity of backgrounds and from across the political spectrum. Congress should study these reports carefully and consider ways to support implementation of their findings.

⁶ See Hughes, Author, Kids Online/Founder, Protectkids.com; William M. Parker, Crosswalk.com; C. Lee Peeler, Federal Trade Commission; Gregory L. Rohde, Department of Commerce/NTIA; C. James Schmidt, San Jose State University; William L. Schrader, PSINet; Larry Shapiro, Walt Disney Internet Group; Srinija Srinivasan, Yahoo! Inc.; Karen Talbert, Nortel Networks; and George Vradenburg III, America Online, Inc.

⁶ The "Final Report of the COPA Commission," released on October 20, 2000, is available online in HTML format at <http://www.copacommission.org/report/> and in PDF format at <http://www.copacommission.org/report/COPAreport.pdf>.

⁷ Pub. L. No. 105-314, Title IX, § 901, 112 Stat. 2991 (1998).

⁸ See Nat'l Research Council of the Nat'l Academy of Sciences, "Youth, Pornography, and the Internet" (2002). The full report is also available online in HTML format at http://books.nap.edu/html/youth_internet/ and in PDF format at <http://books.nap.edu/books/0309082749/html/index.html>.

⁹ Thornburgh Report, at viii – x. The members of the National Academy of Science's committee were Dick Thornburgh, Kirkpatrick & Lockhart LLP, Washington, D.C., (Chair); Nicholas J. Belkin, Rutgers University; William J. Byron, Holy Trinity Parish; Sandra L. Calvert, Georgetown University; David Forsyth, University of California, Berkeley; Daniel Geer, @Stake Inc.; Linda Hodge, Parent Teacher Association; Marilyn Gell Mason, Tallahassee, Florida; Milo Medin, Excite@Home; John B. Rabun, National Center For Missing and Exploited Children; Robin Raskin, Ziff Davis Media; Robert J. Schloss, IBM T.J. Watson Research Center; Janet Ward Schofield, University of Pittsburgh; Geoffrey R. Stone, University of Chicago; Winifred B. Wechsler, Santa Monica, California; and Herbert S. Lin (Senior Scientist and Study Director).

¹⁰ See Thornburgh Report, at x – xi & appendix A.

**Overview of Findings by
the COPA Commission
and the Thornburgh Committee Report**

Both the COPA Commission and the Thornburgh Committee reached the same basic conclusions, although the longer Thornburgh Report spelled out its conclusions in much greater detail. The most critical two conclusions are (A) in light of the global nature of the Internet, criminal laws and other direct regulations of content inappropriate for minors will be ineffective, and (B) education and parental empowerment with filtering and other tools are far more effective than any criminal law. Both of those independent, non-political comprehensive evaluations concluded that protecting children online requires a three-part approach: public education, use of technologies, and parental involvement.

The Thornburgh Committee determined that approximately three-quarters of the commercial sites offering sexually explicit material are located outside the United States.¹¹ According to the report, there are hundreds of thousand non-U.S. sexual web sites. This substantial number of sexually explicit sites outside of the United States means that U.S. criminal statutes or censorship will be ineffectual in protecting minors from sexual content on the Internet. Simply put, even if it were possible (and constitutional) to somehow make *all* U.S.-based sites completely inaccessible to minors, minors would still have hundreds of thousands of overseas sexual sites available to them.

The National Academy report speaks bluntly about the significance of the overseas sexual content in terms of the likely effectiveness of COPA in furthering the governmental interest:

For jurisdictional reasons, federal legislation cannot readily govern Web sites outside the United States, even though they are accessible within the United States. Because a substantial percentage of sexually explicit Web sites exist outside the United States, *even the strict enforcement of [the COPA statute] will likely have only a marginal effect on the availability of such material on the Internet in the United States.* Thus, even if the Supreme Court upholds COPA, COPA is not a panacea, illustrating the real limitations of policy and legal approaches to this issue.¹²

The COPA Commission also recognized that overseas content limits the effectiveness of any one nation's laws.¹³ That Commission analyzed the effectiveness of user-side filtering and blocking technologies. The results indicate that filtering and blocking technologies are more effective for protecting children (and less restrictive of First Amendment values), than the approach taken in the COPA criminal statute.¹⁴

¹¹ See Thornburgh Report, at 4.

¹² Thornburgh Report, at 207. See also Thornburgh Report, at 360 (further detailing why U.S. laws will be ineffective).

¹³ See Final Report of the COPA Commission, at 13 ("Material published on the Internet may originate anywhere, presenting challenges to the application of the law of any single jurisdiction.").

¹⁴ See Final Report of the COPA Commission, at 8, 21, 25, 27.

Similarly, the Thornburgh Committee concluded that education and technology tools were the critical components of a strategy to keep children safe online:

[T]he most important finding of the committee is that developing in children and youth an ethic of responsible choice and skills for appropriate behavior is foundational for all efforts to protect them—with respect to inappropriate sexually explicit material on the Internet as well as many other dangers on the Internet and in the physical world. Social and educational strategies are central to such development, but technology and public policy are important as well—and the three can act together to reinforce each other's value. . . .

Technology-based tools, such as filters, can provide parents and other responsible adults with additional choices as to how best to fulfill their responsibilities. Though even the most enthusiastic technology vendors acknowledge that their technologies are not perfect and that supervision and education are necessary when technology fails, tools need not be perfect to be helpful¹⁵

And critically, the Thornburgh Report suggests that one should look beyond criminal laws for governmental and public policy actions that might help to protect children. As the report notes, "public policy can go far beyond the creation of statutory punishment for violating some approved canon of behavior." The Committee considered a wide array of alternative public policy recommendations, and concluded, for example, that:

- Concrete governmental efforts to promote Internet media literacy and educational strategies would yield superior results without any significant burden on protected speech. Specifically, the report suggests government funding for the development of model curricula, support of professional development for teachers, support for outreach programs such as grants to non-profit and community organizations, and development of Internet educational material, including public service announcements and Internet programming akin to that offered on PBS.¹⁶
- Government support of parents' voluntary efforts to employ technological solutions would provide an effective alternative to criminal laws. While recognizing that filtering technology is not perfect, the Thornburgh Report concludes that filters (which may be installed directly on a computer by end-users or available as a feature offered by an ISP) can have "significant utility in denying access to content that may be regarded as inappropriate."¹⁷

¹⁵ Thornburgh Report, at 365-366.

¹⁶ Thornburgh Report, at 384-385.

¹⁷ Thornburgh Report, at 303. The COPA Commission also identified a range of governmental actions that it believed would significantly contribute to the protection of children on the Internet. Significantly, the passage and enforcement of new criminal laws (like the COPA statute) was not included in the Commission's recommendations. Many of the Commission's recommendations are similar to those later made by the National Academy committee. See Final Report of the COPA Commission, at 39-46.

These two respected blue ribbon panels – the COPA Commission and the Thornburgh Committee – provide a road map for how to effectively protect children in the online.

Importantly, both studies endorse the use of filters and other user empowerment technologies by *end-users*, parents and other caregivers, not by governments or by third party intermediaries (such as ISPs) pursuant to a government mandate. As these studies acknowledge, user empowerment technologies are by their nature imprecise; they often block not only illegal and adult oriented sites, but also a significant amount of valuable and constitutionally protected content. In the hands of families, user empowerment technologies are the least restrictive means of furthering the government's interest in shielding children from inappropriate content; when deployed under government mandate, those same technologies can quickly become tools of censorship.¹⁸ The COPA Commission and Thornburgh Committee recommendations are carefully crafted to avoid that result and to provide guidance on how to take effective and constitutional action to protect children online.

Looking to the Future: User Empowerment in the Age of Convergence

Not only do the reports of the COPA Commission and the Thornburgh Committee provide a road map to Congress, but they also provide a road map to industry and the broader community, indicating what content and technology providers should do to address concerns about children and Internet content. And critically, the industry and public interest organizations are following that road map.

As I mentioned above, leading a broad array of efforts to promote user empowerment and facilitate parents' use of technology tools to protect their children is the GetNetWise.org web site. GetNetWise is a treasure trove of information on parental empowerment tools. GetNetWise is a project of the non-profit Internet Education Foundation, which also staffs the Internet Caucus Advisory Committee and presents speakers and panel discussions on Internet policy issues.

As we are all aware, the Internet is continuing to rapidly evolve and grow, and previously separate technologies like cable television, cellular phones, and mp3 players are on a track to converge with Internet access and to provide access to a wide range of content across multiple platforms. What is critical to note is that user empowerment tools are *also* continuing to evolve, and are also on a track to converge. We have seen an important example of this progress just this week.

¹⁸ A case that CDT litigated illustrates the potential for censorship arising from direct attempts to control content on the Internet. In *CDT v. Pappert*, 337 F.Supp.2d 606 (E.D. Pa. 2004), a Pennsylvania state law required that ISPs block their customers access to designated child pornography sites. The district court struck the law down as unconstitutional because the state's effort to block access to fewer than 400 illegal sites resulted in the blocking of access to more than one million wholly innocent and lawful web sites.

On Tuesday, CTIA – the trade association for the wireless industry – announced that industry’s new “Wireless Content Guidelines” and the industry’s commitment to implement “Internet Content Access Control” technologies to empower parents to be able to control the types of content that can be accessed over wireless phones and other devices. Thus, as content is spreading to new technologies, parental empowerment technology is spreading with it.¹⁹

To be sure, convergence is leading to new challenges. With the lines between various media platforms blurring, the meaningfulness of traditional industry rating schemes may erode, leading to parental confusion. At the same time, the vast majority of audio and video coming online lacks basic ratings information that would otherwise be present if delivered through traditional media channels. Further, some attempts to assign ratings information to converged content are inconsistent, counterintuitive and confusing. In short, the rules of the road are far from clear when it comes to providing ratings information in a converged media environment necessary for meaningful user empowerment.

The Internet Education Foundation has begun a new initiative to help rationalize the differing rating systems and user empowerment tools that are available for TV, movies, DVDs, video games, and other technologies. The goal is to work with industry and other stakeholders to explore ways to ensure that the existing rating schemes easily map to new, non-traditional media outlets and, that content producers of all types can encode ratings information voluntarily into media files in a manner that will enable parents to continue to use technology to control their children’s access to digital content, regardless of the platform.

The convergence of technology that we will see over the next five to ten years will certainly present new challenges for policy makers. But that same convergence will lead to new more sophisticated tools that will help to address concerns about Internet and multimedia content that may be inappropriate for children. There may be important contributions that Congress can make to that effort, most importantly, to provide leadership and support to implement the recommendations of the COPA and Thornburgh studies. The Center for Democracy & Technology looks forward to working with the Judiciary Committee on these and other measures that support the user empowerment approach to protecting kids online.

¹⁹ CTIA’s announcements are discussed at http://www.ctia.org/news_media/press/body.cfm?record_id=1565.

Statement of Sen. Orrin G. Hatch
for the hearing
"Why the Government Should Care About Pornography:
the State Interest in Protecting Children and Families"
United States Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Property Rights
November 10, 2005

Thank you, Mr. Chairman, for holding this hearing and permitting me to participate.

I first introduced legislation to restrict dissemination of obscene material in the 95th Congress, during my first year in the Senate and before the Internet even existed.

What was a problem then has become a crisis today.

Ending in the right place requires starting in the right place.

Pornography and obscenity present a problem of harm, not an issue of taste.

Let me repeat that because we have to be on the right road to get where we need to go.

Pornography and obscenity present a problem of harm, not an issue of taste.

The days are long gone when concerns about the impact of pornography consumption can be dismissed with clichés or jokes about fundamentalist prudes imposing Victorian values.

Actually, that attitude reflects real ignorance about Victorians, but that discussion might be for a different hearing.

Whether it is high-fat foods, second-hand smoke, or hard-core pornography, *what we consume affects us*.

Pornography affects both consumers and the culture.

Surveys, government commissions, clinical research, and anecdotal evidence have long confirmed that pornography consumption correlates with a range of negative outcomes.

Its effects are protracted, progressive, and profound.

Witnesses testifying today will go into more detail about the evidence for how pornography harms consumers.

Evidence for such harm was accumulating years ago, at a time when the methods for producing, marketing, and distributing porn were fairly well defined and somewhat stable.

We now have the Internet, the most pervasive and anonymous medium every devised by human beings.

Pervasiveness and anonymity magnify the effect of pornography consumption on the consumer.

One of the witnesses today has written a book titled *Pornified: How Pornography Is Transforming Our Lives, Our Relationships and Our Families*.

A review of Ms. Paul's book appearing in the September 25, 2005, issue of the *San Francisco Chronicle* said it shows that to discuss porn today is to discuss *Internet* porn.

Another of the witnesses testifying today, Jill Manning, who comes from my home state of Utah, is doing her doctoral work specifically on the unique and devastating effects of Internet pornography.

In addition, the pervasiveness and anonymity of the Internet expand the population of pornography consumers to include children.

Let me be clear.

The problem is not the Internet, the problem is pornography.

But we must take seriously the unique and powerful ways the Internet can be used for evil rather than for good.

In addition to affecting consumers, pornography affects the culture.

Cultural critic Malcolm Muggeridge observed more than 25 years ago that America is more sex-ridden than any country in world history.

Has the situation improved since then?

Today, as we head into the holiday season, obtaining the catalog of certain clothing companies will require a photo ID.

Most fitness magazines are more about sex than about fitness.

A new survey by the Kaiser Family Foundation found that the number of scenes with sexual content on television has doubled in less than a decade.

The highest concentration of sexual scenes is in shows that are most popular with teenagers.

Someone will no doubt haul out the old argument that television merely reflects, but does not influence, reality.

The same Kaiser survey found that the percentage of so-called reality shows with sexual scenes is significantly *lower* than any other type of show.

The percentage of reality shows with sexual scenes is less than half that for talk shows and less than one-third that for drama shows or situation comedies.

In 2001, *Esquire* magazine published a long feature on what it called the *pornographication of the American girl*.

Pornographication!

There should be no need to invent such a word.

Mr. Chairman, it is impossible rationally to argue any more that this is solely a matter of personal taste.

It is a problem of harm.

Harm to individuals, to relationships, to families, to communities, and to children.

As a result, legislators must evaluate whether we have a responsibility to act.

We all believe in freedom of speech.

Mr. Chairman, you and I swore an oath to preserve and protect the Constitution, including the First Amendment.

But the First Amendment is not an altar on which we must sacrifice our children, our families, our communities, and our culture.

Thank you for the chance to participate in this important discussion and to hear from the distinguished panel of witnesses you have assembled.

TESTIMONY OF JILL C. MANNING, M.S.

HEARING ON PORNOGRAPHY'S IMPACT ON MARRIAGE & THE FAMILY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY
RIGHTS
COMMITTEE ON JUDICIARY
UNITED STATES SENATE

November 9, 2005

Thank you Senator Brownback, Senator Feingold and distinguished members of the Subcommittee;

I appreciate this opportunity to address you.

Since the advent of the Internet, the pornography industry has profited from an unprecedented proximity to the home, work and school environments. Consequently, couples, families, and individuals of *all* ages are being impacted by pornography in new and often devastating ways.

Although many parents work diligently to protect their family from sexually explicit material, research funded by Congress has shown Internet pornography to be "very intrusive."¹ Additionally, we know that a variety of fraudulent, illegal and unethical practices are used to attract new customers and eroticize attitudes that undermine public health and safety. This profit-driven assault jeopardizes the well-being of our youth and violates the privacy of those who wish not to be exposed.

Leading experts in the field of sexual addictions contend on-line sexual activity is "a hidden public health hazard exploding, in part because very few are recognizing it as such or taking it seriously."²

Research reveals many systemic effects of Internet pornography that are undermining an already vulnerable culture of marriage and family. Even more disturbing is the fact that the first Internet generations have not reached full-maturity, so the upper-limits of this impact have yet to be realized. Furthermore, the numerous negative effects

¹ Mitchell, K. J., Finkelhor, D., & Wolak, J. (2003). The Exposure of Youth to Unwanted Sexual Material on the Internet: A national survey of risk, impact, and prevention. *Youth & Society*, 34(3), pp. 330-358.

² Cooper, A., Delmonico, D. L., & Burg, R. (2000). Cybersex users, abusers, and compulsives: New findings and implications. *Sexual Addictions & Compulsivities*, 7, 5-29.

research point to are extremely difficult, if not impossible, for individual citizens or families to combat on their own.

This testimony is not rooted in anecdotal accounts or personal views, but rather in findings from studies published in peer-reviewed research journals. I have submitted a review of this research to the Committee, and request that it be included in the record.

The marital relationship is a logical point of impact to examine because it is the foundational family unit and a sexual union easily destabilized by sexual influences outside the marital contract. Moreover, research indicates the majority of Internet users are married and the majority seeking help for problematic sexual behaviour online are married, heterosexual males. The research indicates pornography consumption is associated with the following six trends, among others:

1. Increased marital distress, and risk of separation and divorce,
2. Decreased marital intimacy and sexual satisfaction,
3. Infidelity
4. Increased appetite for more graphic types of pornography and sexual activity associated with abusive, illegal or unsafe practices,
5. Devaluation of monogamy, marriage and child rearing,
6. An increasing number of people struggling with compulsive and addictive sexual behaviour.

These trends reflect a cluster of symptoms that undermine the foundation upon which successful marriages and families are established.

While the marital bond may be the most vulnerable relationship to Internet pornography, children and adolescents are the most vulnerable audience.

When a child lives in a home where an adult is consuming pornography, he or she encounters the following four risks:

1. Decreased parental time and attention
2. Increased risk of encountering pornographic material
3. Increased risk of parental separation and divorce and
4. Increased risk of parental job loss and financial strain

When a child or adolescent is directly exposed the following effects have been documented:

1. Lasting negative or traumatic emotional responses,
2. Earlier onset of first sexual intercourse, thereby increasing the risk of STD's over the lifespan,
3. The belief that superior sexual satisfaction is attainable without having affection for one's partner, thereby reinforcing the commoditization of sex and the objectification of humans.
4. The belief that being married or having a family are unattractive prospects;
5. Increased risk for developing sexual compulsions and addictive behavior,
6. Increased risk of exposure to incorrect information about human sexuality long before a minor is able to contextualize this information in ways an adult brain could.
7. And, overestimating the prevalence of less common practices (e.g., group sex, bestiality, or sadomasochistic activity).

Because the United States is ranked among the top producers and consumers of pornography globally, the federal government has a unique opportunity to take a lead in addressing this issue and the related harm.

This leadership could unfold in a variety of ways. For example, through:

- Educating the public about the risks of pornography consumption,
- Supporting research that examines aspects of Internet pornography currently unknown,
- Allocating resources to enforce laws already in place, and lastly,
- Legally implement technological solutions that separate Internet content, allowing consumers to choose the type of legal content they wish to have access to.

In closing, I am convinced Internet pornography is grooming young generations of Americans in such a way that their chances of enjoying healthy and enduring relationships are handicapped. I hope this committee will carefully consider measures to reduce the harm associated with Internet pornography.

I thank the Committee for this opportunity to testify and welcome your questions at this time.

Pamela Paul

Written Testimony to Congress

Senator Brownback and other distinguished Members of Congress, my name is Pamela Paul and I want to thank you for the opportunity to participate in this hearing on the effects of pornography on the American family. I don't think I ever imagined I would be testifying in front of Congress – and talking about pornography of all things. But after writing a story for *Time* magazine about pornography's effects on users in January 2004, I was compelled by the seriousness of what I uncovered to devote more time to writing a book on the subject. That book, *PORNIFIED: How Pornography is Transforming Our Lives, Our Relationships and Our Families* was published in September of this year. In addition to writing this book, I am a contributor to *Time* magazine, where I cover social trends and issues affecting women, families and children. I have written for a variety of other publications including *The Economist*, where I was a correspondent for five years, *Psychology Today* and *The New York Times Book Review*. I was formerly a senior editor at *American Demographics* magazine, where I analyzed social, demographic and media trends, and wrote a column on public opinion polling. And my first book, *The Starter Marriage and the Future of Matrimony*, an examination of marital and divorce trends among today's marrying generation, was published in 2002.

As I hope will be understandable, I'm going to refrain from using much of the graphic detail in this testimony that I documented in my book. This will necessarily not give a full picture of the damage that pornography does to men, women and children, but I hope to give a general idea, and those who wish to get a more complete – and disturbing – picture can refer to my book, which I am submitting along with my testimony.

First, an explanation of how I got started on this subject. For most of my life, I gave little thought to pornography. It was not something I considered relevant to me, nor did I consider it to be a particularly pressing issue facing this country. Pornography had played a negligible role in my own life and, I assumed, had little effect on the lives of those important to me. But on assignment to write about pornography for *Time* magazine, my eyes were blown wide open. During the weeks spent researching my article, I spoke with dozens of men and women about how profoundly pornography had affected their lives. I talked to male pornography users, female pornography fans and girlfriends of pornography fans, sex addicts and their wives, child psychologists and couples therapists.

Much of what I heard during these interviews was not just news; it was revelatory. There was a story about pornography that had not yet been told, a story many Americans, male and female, don't

realize is unfolding – in front of their eyes, inside their minds, on their family computer – at this very moment. In researching my book, I sought answers to some simple questions: Who uses pornography and why? What do men see in it? Are more women indulging? How does pornography affect people? Will looking at online pornography at age nine affect boys and girls when they reach sexual maturity? What is the impact of a pornified culture on relationships and on society as a whole?

To find out the private stories that people suspect but never hear; experience, but never talk about, I interviewed more than 100 people (approximately 80 percent male), all heterosexual, about the role pornography plays in their lives. While the scope of such qualitative research can never claim to be fully representative of all Americans, the people interviewed were expressly chosen to provide a broad spectrum. They ranged in age from 21 to 59; most were in their 20s and 30s. The men and women interviewed were diverse – ethnically, geographically, socio-economically. They were from a variety of backgrounds and religions, educations and occupations. No “profile” of the pornography user emerged because pornography cuts across all swathes of society.

In addition, I commissioned the first nationally representative poll, conducted by Harris Interactive, to deal primarily with pornography. Unlike other polls referred to in this book, many of which were online polls, this poll actually reflects what the whole spectrum of Americans think; the poll is weighted demographically and geographically to represent the actual ethnic, age, and socioeconomic composition of America. It’s the first poll to ask many important questions such as, Does pornography improve the sex lives of those who look at it? Is using pornography cheating? Do you believe all men look at pornography? and How does pornography affect the children who view it?

We can lament what’s happened to our pornified culture – in which the values, aesthetics and standards of pornography have trickled down into mainstream music, television and movies – but what’s truly worrisome is how pornography has affected the lives of individuals. Despite the claim that porn is harmless entertainment, the use of pornography has serious, negative effects.

Countless men described how, while using porn, they have lost the ability to relate or be close to women. They have trouble being turned on by “real” women, and their sex lives with their girlfriends or wives collapse. These are men who seem like regular guys, but spend hours each week with porn – usually online. And many of them admit they have trouble cutting down their use. They also find themselves seeking out harder and harder pornography.

Many women try to write porn off as “a guy thing,” but are profoundly disturbed when they are forced to come to terms with the way porn plays into their lives – and the lives of their boyfriends or husbands – today. They find themselves constantly trying to measure up to the bodies and sexual performance of the women their men watch online and onscreen. They fear that they’ve lost the ability to turn their men on anymore – and quite often, they have.

One 24-year-old woman from Baltimore confided, “I find that porn’s prevalence is a serious hindrance to my comfort level in relationships. Whether it’s porn DVDs and magazines lying around the house, countless porn files downloaded on their computers, or even trips to strip clubs, almost every guy I have dated (as well as my male friends) is very open about his interest in porn. As a result, my body image suffers tremendously...I wonder if I am insecure or if the images I see guys ogle every day has done this to me...” She later confessed that she felt unable to air her concerns to anyone. “A guy doesn’t think you’re cool if you complain about it,” she explained. “Ever since the Internet made it so easy to access, there’s no longer any stigma to porn.”

A 38-year-old woman from a Chicago suburb described her husband’s addiction to pornography: “He would come home from work, slide food around his plate during dinner, play for maybe half an hour with the kids, and then go into his home office, shut the door and surf Internet porn for hours. I knew – and he knew that I knew. I put a filter on his browser that would email me every time a pornographic image was captured.... I continually confronted him on this. There were times I would be so angry I would cry and cry and tell him how much it hurt.... It got to the point where he stopped even making excuses. It was more or less: ‘I know you know and I don’t really care. What are you going to do about it?’”

Of course, many mothers – and fathers (even those who use porn themselves) – are particularly disturbed by the idea that their children will look at pornography. Make no mistake: Experts today say there is no way parents can prevent their children from looking at pornography at a young age – as young as two- to six-years-old, according to Nielsen/NetRatings. Even if a parent uses a filtering program, children can likely outmaneuver the software, or see porn at their local library or a friend’s house. And early exposure to pornography seems to be influencing the dating antics of pre-teens and teenagers, as well as in more serious and disturbing behavior.

In researching my book, I focused on four areas in which pornography has major repercussions on peoples’ lives. First of all, and perhaps most obvious, pornography has a negative impact on the men who use it. But it also has a major impact on women, and on relationships between men and women.

And perhaps most frightening of all, especially moving forward, pornography is having a serious impact on children – and at younger ages than ever before.

Pornography's Effects on Men

When opponents of pornography talk about the ways in which pornography affects people, they often talk about how pornography hurts women. But this leaves out an important point: Pornography is also harmful to the men who use it. Men told me they found themselves wasting countless hours looking at pornography – on their televisions and DVD players, and especially online. They looked at things they would have once considered appalling – bestiality, group sex, hardcore S&M, genital torture, child pornography. They found the way they looked at women in real life warping to fit the pornography fantasies they consumed on screen. Their daily interactions with women became pornified. Their relationships soured. They had trouble relating to women as individual human beings. They worried about the way they saw their daughters, and girls their daughters' age. It wasn't only their sex lives that suffered – pornography's effects rippled out, touching all aspects of their existence. Their work days became interrupted, their hobbies tossed aside, their family lives disrupted. Some men even lost their jobs, their wives and their children. The sacrifice is enormous.

Nor is it only the most violent hardcore pornography that wreaks damage. According to a large-scale 1994 report summarizing 81 peer-reviewed research studies, most studies (70 percent) on non-aggressive pornography find that exposure to pornography has clear negative effects.¹ Gary Brooks, a psychologist who studies pornography at Texas A&M University, explains that “soft-core pornography has a very negative effect on men as well. The problem with soft-core pornography is that it's voyeurism – it teaches men to view women as objects rather than to be in relationships with women as human beings.”

Because pornography involves looking at women but not interacting with them, it elevates the physical while ignoring or trivializing all other aspects of the woman. A woman is literally reduced to her body parts and sexual behavior. Not surprisingly, half of Americans say pornography is demeaning towards women, according to the *Pornified*/Harris poll. Women are far more likely to believe this – 58 percent compared with 37 percent of men. Only 20 percent of women – and 34 percent of men – think pornography *isn't* demeaning. Of course, with increased viewing, pornography becomes acceptable and what once disturbed fails to upset with habituation. While 60

percent of adults age 59 and older believe pornography is demeaning towards women, only 35 percent of Gen Xers – the most tolerant and often heaviest users – agree.

But pornography doesn't just change how men view women – it changes how men see themselves and how their own lives play out. Advocates aren't shy about extolling pornography's enticing effects. The first step is usually an increase in frequency and quantity of viewing. More times logging online or clicking the remote control, prolonged visits to certain Web sites, a tendency to fall into a routine. In a 2004 *Elle*/MSBNC.com poll, nearly one in four men admitted they were afraid they were "overstimulating" themselves with online sex. In fact, that routine is an essential ingredient in the financial success of high-tech porn. Wendy Seltzer, an advocate for online civil liberties, argues that pornographers should not even be concerned over piracy of their free material. According to Seltzer, "People always want this stuff. Seeing some of it just whets their appetite for more. Once they get through what's available for free, they'll move into the paid services."⁶ And once they've indulged in more quantity, they want more quality – meaning more action, more intensity, more extreme situations. The impetus to find harder core fare affects the entire industry.

Particularly on the Internet, men find themselves veering off into pornographic arenas they never thought they could find appealing. Those who start off with soft-core develop a taste for harder core pornography. Men who view a lot of pornography talk about their disgust the first time they chanced upon an unpleasant image or unsolicited child porn. But with experience, it doesn't bother them as much – shock wears thin quickly, especially given the frequent image assault they encounter on the Internet. They learn to ignore or navigate around unwanted imagery, and the third time they see an unpleasant image, it's merely an annoyance and a delay. At the same time that such upsetting imagery becomes less unpleasant, arousing imagery becomes less interesting, leading the online user to ratchet up the kind of pornography he seeks, seeking more shocking material than he started out with.

Most women have no idea how often their boyfriends and husbands look at pornography. Usually, the deception is deliberate, though many men also deny how often they look at it. Most simply don't think about quantifying the amount they view. And while men consider trust crucial for a healthy relationship, they seem willing to flout that trust when it comes to pornography – deceiving their significant others into thinking they're either not looking at it at all or are looking at it less frequently. Fitting pornography into one's life isn't always easy.

Pornography's Effects on Women

Having won over men, the pornography industry is eager to tap into the other potential 50% of the market: women. A number of companies are increasing production of pornography made by and for women, and the industry is keen to promote women's burgeoning pornography predilection. *Playgirl* TV announced its launch in 2004 with programming to include an "erotic soap opera" from a woman's point of view, a 1940s style romantic comedy with "a sexual twist," and roundtable discussions of "newsworthy women's topics."

In recent years, women's magazines have regularly featured a discussion of pornography from a new perspective: how women can introduce it into their own lives. While many women continue to have mixed or negative feelings towards pornography, they are told to be realistic, to be "open-minded." Porn, they are told, is sexy, and if you want to be a sexually attractive and forward-thinking woman, you've got to catch on. Today, the pornography industry has convinced women that wearing a thong is a form of emancipation, learning to pole dance means embracing your sexuality and taking your boyfriend for a lap dance is what every sexy and supportive girlfriend should do. According to a 2004 Internet poll conducted by *Cosmopolitan* magazine, 43 percent of women have been to a strip club. In an *Elle* magazine poll, than half the respondents described themselves as "pro-stripping" (56 percent) and said they weren't bothered if their partner went to strip clubs (52 percent).

Some attribute the rise in female consumption to an increased supply in pornography for women. That may be part of the reason, but there's more at play than a simple supply-and-demand equation. Broader societal shifts in men's and women's roles in relationships and a corresponding swing in women's expectations and attitudes towards their sexuality are driving women to pornography too. Sociologist Michael Kimmel, who studies pornography and teaches sexuality classes at the State University of New York at Stony Brook, says, "Twenty years ago, my female students would say, 'Ugh, that's disgusting,' when I brought up pornography in class. The men would guiltily say, 'Yeah, I've used it.' Today, men are much more open about saying they use pornography all the time and they don't feel any guilt. The women now resemble the old male attitude: They'll sheepishly admit to using it themselves." Women's attitudes have merged even more closely with men's.

The Internet measurement firm comScore tracked close to 32 million women visiting at least one adult Web site in January 2004. Seven million of them were ages 35 to 44, while women over the age of 65 totaled only 800,000.ⁱⁱⁱ Nielsen NetRatings has found the figures to be somewhat lower, with 10 million women visiting adult content Web sites in December 2003.^{iv} In a 2004 *Elle*/MSNBC.com poll, 41% of women said they have intentionally viewed or downloaded erotic films or photos and 13% watched or sexually interacted with someone on a live Webcam.

As much as women are touted as the new pornography consumer, they still lag far behind men. The spitfire headlines do little to reflect the reality of most women's experiences. Statistics belie the assertions of the pro-porn movement and the go-go girl mentality espoused by female pornography purveyors. While some polls show that up to half of all women go online for sexual reasons, the percentage of women who say they do are likely exaggerated by the inclusion of erotica, dating, and informational sites in the definition of "adult" Internet content, areas to which women are disproportionately drawn compared with men. Many women who are tracked through filtering sites are linked to pornography by accident, visit out of curiosity, or are tracking down their male partner's usage. Others feel like admitting they don't look at pornography at all is akin to affixing a "frigid" sticker to their chastity belts; better not to come off as uptight.

Pornography's Effects on Relationships

For many wives and girlfriends, it becomes immediately clear that the kind of pornography their men are into is all about the men – about their needs, about what they want, not about their women or their relationships or their families. Men aren't completely in denial either; they often recognize their kind of pornography doesn't exactly reflect well on themselves or on their partners. It's not surprising to either party when a woman ends up feeling second rate. Not only does pornography dictate how women are supposed to look; it skews expectations of how they should act. Men absorb those ideals, but women internalize them as well. According to the *Pornified*/Harris poll, most women (six out of ten) believe pornography affects how men expect them to look and behave. In fact, only 15 percent of women believe pornography *doesn't* raise men's expectations of women.

Men tell women their consumption of pornography is natural and normal, and if a woman doesn't like it, she is controlling, insecure, uptight, petty, or a combination thereof. The woman demands. She is unreasonable. He has to give up something he's cherished since boyhood. She's not supportive. She blows everything out of proportion. If it weren't for this attitude of hers, the relationship would be fine. For a woman to judge pornography as anything but positive is read as a condemnation of her man or at the very least, of his sexual life. Discomfort with pornography also becomes a woman's discomfort with her own sexuality. Still, the *Pornified*/Harris poll found that only 22 percent of Americans believe pornography improves the sex life of those who look at it. Indeed one-third of respondents to this book's nationwide poll believe looking at pornography *won't* harm a couple's relationship.

Despite appearances, pornography isn't precisely a solo activity. As interviews with men and women attest, it plays into how people approach and function in relationships. Whether a couple watches together, or one or both partners uses it alone, pornography plays a significant role not only in sex but in a couple's sense of trust, security, and fidelity. As Mark Schwartz, clinical director of the Masters and Johnson Clinic in St. Louis, Missouri, says, "Pornography is having a dramatic effect on relationships at many different levels and in many different ways – and nobody outside the sexual behavior field and the psychiatric community is talking about it."

Not knowing who to turn to when their boyfriends turn away from them and towards pornography, many women write in to magazine advice columnists for help or ask for support in online forums. Female-oriented Internet communities (chat rooms, bulletin boards, online forums, etc.) teem with discussions on the subject. Every week, an advice columnist across the country addresses the issue; presumably many similar letters go unanswered in print. Just one example: A woman writes to a local newspaper, "We've been together five years, lived together half that time. We have a loving, happy relationship. Recently, I discovered via the computer that he's fascinated by hardcore pornography, lots of it. When confronted, he said I have no right to be upset, though he's aware it offends me; he insisted I let it go. He's still spending hours looking at this and I'm disgusted... I've tried to discuss how degrading and controlling this seems to me but he's not willing to give it up. I know many people think it's harmless but it's making me question whether I'm willing to continue a relationship with someone who can disregard my feelings so easily."^v

And where do men get the time? Take your average husband and father. A full-time job often means that he's up at six and out of the house by 7:30. Sometimes he goes to the gym after work, but usually he comes straight home for dinner. He would like an hour with the kids at night, to spend more time with his wife, to get in some reading. But there's always something that needs to get done – the dog to be walked, bills to be paid, a bit of housework perhaps. On weekends, he's running between the kids' soccer game, Home Depot and the occasional round of golf. An extra two or three hours for pornography every week necessarily takes away from something. Of course, it is conceivable that he's all caught up with everything and has time to spare that couldn't be better spent with friends, his wife, his kids, his parents, or himself – reading, improving his tennis game, catching up on paperwork. But for many men, pornography takes away from time and energy that could be better spent on marriage and family.

Already, families, particularly dual income couples, complain about how little time they have for their spouses and family. Imagine the toll that devoting five or so hours a week to pornography takes on

family life. Meals that could have been prepared and eaten together, homework that could have been pored over, family movies that could have been watched in each others' company. Imagine the anxiety and tension caused to a mother who knows her husband is online looking at pornography while his son is desperate for daddy's company.

Not surprisingly, researchers have found that prolonged exposure to pornography fosters sentiments *against* having family. In 2000, psychiatrist Jennifer P. Schneider conducted a study of 91 women and 3 men whose spouses or partners had become involved in cybersex. Among couples with children, 37 percent reported that children lost parental time and attention due to a parent's online sexual activities.²¹ In the 2004 *Elle*/MSBNC.com poll, men confessed that online pornography was eating up hours formerly devoted to other things. One in five said pornography took away from time they used to spend working, and another fifth said it took time away from hours they used to devote to their partner or their children. Heavier users (five hours or more online per week) were more likely to experience the crunch: 37 percent said time had been eked away from work and 37 percent admitted it took time previously devoted to family.

That so many men consider pornography a private matter, one hidden or downplayed, necessarily creates distance with their girlfriends and wives. According to Mark Schwartz of the Masters and Johnson Clinic, no matter how you look at it, pornography is always a sign of disconnection; those who seek it out often do so because of boredom or dissatisfaction elsewhere in their lives. In his research he's seen a "whole new epidemic," largely related to the Internet, of people using pornography to disconnect from their wives. "If porn is increasing involvement with your partner -- you're getting turned on and then running to be with your wife, that's one thing," he says. "But we're seeing more men and women with an intimacy disorder, having trouble connecting with their spouse."

The nationally representative *Pornified*/Harris poll found that overall, 34 percent of women see men using pornography as cheating in absolutely all cases. Yet only 17 percent of men equated pornography with cheating. Indeed, most men tend to see pornography as *not* cheating: A man has his needs and he's fulfilling them in a way that prevents him from cheating on his wife with a real woman. According to the *Pornified*/Harris poll, 41 percent of men say pornography should never be considered cheating (only 18 percent of women felt the same way).

Once she's discovered his pornography, what next? Psychotherapist Marlene Spielman says when a woman finds out about a man's pornography habit, the result is usually a back and forth of very

strong emotions. The woman typically feels hurt, angry and betrayed. Confronted husbands often begin with denial before confessing the truth, followed by a big fight, blaming and accusations. He may accuse her of driving him to it; she might point to his avoidance of problems in the relationship.

More women are installing programs like NetNanny on their computers to limit their home computer Internet access to PG Web sites. According to one filtering company, WiseChoice.net, more than half the company's 3,000 customers are adults who use the software not to block their kids' access but to keep themselves and other adults from looking.^{vi} Others see the need for a stronger dose of intervention. In the 2004 *Elle*/MSBNC.com poll, one in four women said they were concerned their partner had an "out-of-control habit" with online pornography, and one in four divorced respondents said Internet pornography and chat had contributed to their split. At the 2003 meeting of the American Academy of Matrimonial Lawyers, a gathering of the nation's divorce lawyers, attendees documented a startling trend. Nearly two-thirds of the attorneys present had witnessed a sudden rise in divorces related to the Internet; 58 percent of those were the result of a spouse looking at excessive amounts of pornography online. According to the association's president Richard Barry, "Eight years ago, pornography played almost no role in divorces in this country. Today, there are a significant number of cases where it plays a definite part in marriages breaking up."

Matrimonial lawyers across the country attest to the growing docket of cases. "Pornography wrecks marriages," says Marcia Maddox, a Vienna, Virginia-based attorney. Among the five attorneys in her office, there's always a case involving pornography being worked on at any time. In one case, a wife found out her husband was involved in Internet pornography while she and their daughter were working on a school project. Horrified, the woman hired a computer technician, who discovered a trove of hardcore pornography on the hard drive. The couple ended up getting a divorce; the mother was awarded sole custody. In another case that also ended in divorce, the husband was regularly using porn on the computer until 2 in the morning. According to Maddox, most cases settle rather than go to court because it's embarrassing for the man's pornography to come out in public, particularly when children are involved. "I'm 62," Maddox says. "I didn't grow up with computers and these cases blow my mind." The fact is, she says, "Using pornography is like adultery. It's not *legally* adultery, which requires penetration. But there are many ways of cheating. It's often effectively desertion – men abandoning their family to spend time with porn." Often the judges find that even if children aren't directly exposed to a father's pornography, they are indirectly impacted because their fathers ignore them in favor of porn. Visitation in such cases may be limited.

Mary Jo McCurley, an attorney who has practiced family law in Dallas since 1979, agrees. In the past five years, more and more cases are brought forth in which a husband's pornography habit is a factor. "We see cases in which the husband becomes so immersed in online porn it destroys the marriage," she explains. "Not only is it unsettling for the wife that he's using other women to get off, but it takes away from the time they could spend together as a couple." In divorce cases these days, enormous amounts of time and money are spent recovering pornography off computers. "You can hire experts who specialize in digging through hard drives," McCurley says. "There are people who have made a profession out of it. It's become quite common in Texas divorce."

Still, many women equivocate over how to handle their husband's use, questioning themselves and their feelings. "Dear Abby," writes one woman from Kentucky. "My husband has run up telephone bills amounting to \$15,000. His credit cards are maxed out on '900' numbers. When I leave the house, he immediately puts our daughters in their rooms and goes online to porn sites or to talk to women. He is taking much-needed money from me and our children to get his kicks. I have begged him to stop, but the problem is getting worse. Should I stick to my word and leave him if he doesn't quit?"^{70a}

Sadly and perhaps not surprisingly, women tend to blame themselves when their partners stray into pornography. "Dear Dr. Ruth," writes another woman. "I've been married for two years now (second husband). My husband seems to be very interested in sex, i.e., Internet pics, magazines, Watching Playboy, tele-companions; however, I'm not getting any! For the past 15 months, I can count the times we've had sex on two hands. We've talked some about it, but I feel that at this point I'm begging. Is it me? I love my husband with all my heart. We are raising two teenagers. Sometimes it seems like we're a great team at being parents, but not at being a couple. What should I do? I am seriously concerned with this problem and need some help."^{70b}

Meanwhile, women beat themselves up over "driving" their partners to porn. Perhaps it was her fault; she wasn't a good enough wife or sexy enough lover. The women married to pornography users echo each other's pain: A 38-year-old mother of two from a Chicago suburb says her husband's pornography made her feel inadequate. Her husband seemed to demand perfection and she felt like a constant disappointment. She didn't wear the right clothes. She didn't look right when she wore them. She never performed in bed the way he wanted her to. "I began to feel physically like I was not a sexual being," she recalls. "I knew I could never measure up, so I couldn't compete." She tried watching pornography with her husband. "If you can't beat them, join them," she figured. "But I also had this sense I was reaching new lows," she says. "I was compromising my own feelings and

beliefs.” A teacher from Dallas says when she found out her husband was using pornography behind her back, she felt sick and angry. “Those women are so unreal,” she says helplessly. “They’re so different from the normal average person. I didn’t measure up at all.” She wondered if it was because she was a bit overweight. “Maybe that’s what drove him to this,” she worried. But then again, even if she were her perfect weight, she would never look like them. She figured she may as well just give up.

Pornography’s Effects on Children

It does seem like pornography’s infiltration into our lives has become inevitable. Learning to like pornography online is fast becoming the new norm in this country. According to the *Pornified*/Harris poll, 71 percent of 18-to-24-year-olds agreed with the statement, “I have seen more pornography online than I have seen offline (in magazines, movie theatres, TV)” – twice the number of Baby Boomers. More than half admit it’s hard for them to go online *without* seeing pornography.

This moment of contact takes place at an increasingly young age. According to a 2001 study by the Kaiser Family Foundation, seven in ten 15-to17-year-olds admitted to “accidentally” stumbling across pornography online. Girls were more likely than boys to say they were “very upset” by the experience (35 percent versus 6 percent). While a majority of 15-to 24-year-olds (65 percent) said they thought viewing such pornography could have a serious impact on people under 18, younger kids were more likely to take it in stride: 41 percent of 15-to17-year-olds said it wasn’t a big deal.

Statistics show that about half – if not all – teenagers are exposed to pornography one way or another. A 2004 study by Columbia University found that 11.5 million teenagers (45 percent) have friends who regularly view Internet pornography and download it.^x The prevalence of teens with friends who view and download Internet pornography increases with age, from nearly one-third of 12-year olds to nearly two-thirds of 17-year olds saying they have friends who use online porn. Boys are significantly more likely than girls to have friends who view online pornography: 46 percent of 16- and 17-year old girls say they have friends who regularly view and download Internet pornography, compared with 65 percent of boys the same age; the comparable percentage for 12- and 13-year old girls and boys are 25 percent and 37 percent respectively.^{xi}

Psychotherapists and family counselors across the country attest to the popularity of pornography among pre-adolescents. “I’ve had my own therapy practice for over 25 years,” says Judith Coché, a clinical psychologist who runs The Coché Center in Philadelphia and teaches psychiatry at the University of Pennsylvania. “I feel like I’ve seen everything.” She pauses and says almost

apologetically, “I’m going to say something really strong. I’ve been walking around my practice saying, ‘We have an epidemic on our hands.’ The growth of pornography and its impact on young people is really, really dangerous. And the most dangerous part is that we don’t even realize what’s happening.”

Coché describes one case in which an 11-year-old girl, was found creating her own pornographic Web site. When her parents confronted her, she said that pornography was considered ‘cool’ among her friends. Perhaps it wasn’t a very good idea, the girl admitted, but all her friends were doing it. Her parents were horrified.” More boys – often pre-adolescents – are being treated for pornography addiction, Coché says. “Before the Internet, I never encountered this.”

According to Coché, the effects on such ever-present pornography on kids who are still developing sexually – or who haven’t hit puberty – has yet to be fully understood. Coché has talked to parents who have witnessed their sons playing computer games when pornographic pop-ups come onto the screen. “Pornography is so often tied into video game culture and insinuates itself even into non-pornographic areas of the Web. It’s very hard for a 12-year-old boy to avoid.” As a result, boys are learning to sexually cue to a computer, rather than to human beings. “This is where they’re learning what turns them on. And what are they supposed to do about that? Whereas once boys would kiss a girl they had a crush on behind the school, we don’t know how boys who become trained to cue sexually to computer-generated porn stars are going to behave, especially as they get older.”

Pornography is wildly popular with teenage boys in a way that makes yesteryear’s sneaked glimpses at *Penthouse* seem monastic. The prevalence of the Internet among teenagers has made pornography just another online activity; there is little barrier to entry and almost no sense of taboo. Instead, pornography seems to be a natural rite and an acceptable pastime. One teenage boy in Boston explained recently to *The New York Times*, “Who needs the hassle of dating when I’ve got online porn?”^{xvi} Pornography is integrated into teenage pop culture; videogame culture, for example, exalts the pornographic. One 2004 video, “The Guy Game,” features women exposing their breasts when they answer questions wrong in a trivia contest; the game, available on Xbox and PlayStation 2, didn’t even get an “Adults-Only” rating. (The game manufacturer is being sued because one woman included in the footage was only 17 and didn’t give her consent to be filmed.)^{xvii}

Like all good marketers, pornographers know it’s important to reel consumers in while they’re young. MTV recently announced the launch of a Stan Lee/Hugh Hefner collaboration, *Hef’s Superbunnies*, an

“edgy, sexy animated series” from the creator of the *Spider-Man* comic book series featuring a buxom team of specially trained Playboy bunnies.^{xv} Marketers have extended the porn brand to everything from sporting equipment to clothing. Two snowboarding companies, Burton Snowboards and Sims, now offer boards emblazoned with images of Playboy bunnies and Vivid porn stars. Sims boasts that their so-called “Fader” boards, which feature photographs of Jenna Jameson and Brianna Banks, are their bestsellers. Such boards are clearly marketed to teenagers, which form the backbone of the snowboarding market. Mainstream videogames regularly feature pornographic elements. “BMX XXX”, for example, adds a pornographic sheen to bike stunts and racing. Another game, “Leisure Suit Larry: Magna Cum Laude” features full-on nudity as gamers live out the player lifestyle, trying to score hot babes. The game’s manufacturers are fighting to obtain an “M” rating (the equivalent of a movie’s “R”) in order to ensure carriage at Wal-Marts across America.^{xvi} Groove Games and ARUSH Entertainment has developed “Playboy: The Mansion,” a videogame in which gamers adopt the role of Hugh Hefner as they “live the lifestyle” by hosting “extravagant parties” and undertaking “empire-building challenges.” Given that *Playboy* readers already spend \$300 million on video games annually and more than three million readers own a video game system, “residents” of the new mansion look to be built in.

Kids also absorb pornography very differently from the way adults do. Not only are kids like sponges, they are also quite literal. Even young teenagers are generally not sophisticated enough consumers to differentiate between fantasy and reality. What they learn from pornography are direct lessons, with no filter, and with no concept of exaggeration, irony, or affect. They learn what women supposedly look like, how they should act, and what they’re supposed to do. They learn what women “want” and how men can give it to them. They absorb these lessons avidly, emulating their role models. Still, many older kids at least partly recognize the negative side. When asked in a 2001 study by the Kaiser Family Foundation, 59 percent of 15-to-24-year-olds said they thought seeing pornography online encouraged young people to have sex before they are ready, and 49 percent thought it would lead people to think unprotected sex is OK. Nearly half (49 percent) thought Internet pornography could lead to addiction and promote bad attitudes towards women. In a 2002 nationwide Gallup poll, 69 percent of teenage boys between the ages of 13 and 17 said that even if nobody ever knew about it, they would feel guilty about surfing pornography on the Internet. Not surprising, an even greater number of girls – 86 percent – felt the same way.

Pornography in all its permutations affects developing sexuality; the younger the age of exposure and the more hardcore the material, the more intense the effects. Boys who look at pornography

excessively become men who connect arousal purely with the physical, losing the ability to become attracted by the particular features of a given partner. Instead, they recreate images from pornography in their brain while they're with a real person. "It's sad that boys who are initiated to sex through these images become indoctrinated in a way that can potentially stay with them for the rest of their lives," Gary Brooks says. "Boys learn that you have sex in spite of your feelings, not because of your feelings. Meanwhile, girls are taught that you don't have intimacy without relationships."

Watching pornography, kids learn that women always want sex and that sex is divorced from relationships. They learn that men can have whomever they want and that women will respond the way men want them to. They learn that anal sex is the norm and instant female orgasm is to be expected. "Kids today are going to run into pornography online, not erotica," explains Aline Zoldbrod, the Lexington, Massachusetts-based psychologist and sex therapist. "They're getting a very bad model. Pornography doesn't show how a real couple negotiates conflict or creates intimacy." For girls especially, Zoldbrod believes pornography, particularly online, is a "brutal way to be introduced to sexuality," since much of it she deems "rape-like" in its use of violence. When asked in the *Pornified*/Harris poll what the greatest impact of pornography on children is, 30 percent of Americans said the fact that it distorts boys' expectations and understanding of women and sex, 25 percent said that it makes kids more likely to have sex earlier than they might have, 7 percent cited the way it distorts girls' body images and ideas about sex, and 6 percent said it makes kids more likely to look at pornography as adults (men were twice as likely to believe this last as women). Only 2 percent of Americans actually believe that pornography helps kids better understand sexuality. And only 9 percent think it has no impact on children at all.

No matter what kind of pornography they look at, spending one's pre-pubescence and puberty on porn can have lifelong implications. Masters and Johnson's clinical director Mark Schwartz has seen 14- and 15-year-old boys who are addicted to pornography. "It's awful to see the effect it has on them," he says. "At such a young age, to have that kind of sexual problem." Schwartz isn't surprised about the growing number of young addicts in the Internet age. "Your brain is much more susceptible," he explains. "Many of these boys are very smart and academically successful; a lot of computer geeks are the ones who get drawn in. It affects how they develop sexually. Think about a 12-year-old boy looking at *Playboy* magazine. When you're talking about Internet pornography, you can multiply that effect by the relative size of the Internet itself."

Research trickling in has begun to document the effects of pornography on kids, a difficult area to study given obvious ethical challenges. Certainly, no parent would consent to have their children

view pornography in order to further research on the damage done. Still, some evidence has been gathered. A recent study of 101 sexually abusive children in Australia documented increased aggressiveness in boys who use pornography. Almost all had Internet access and 90 percent admitted to seeing pornography online. One-fourth said an older sibling or friend had shown them how to access pornography online, sometimes against their will; another fourth said that using pornography was their primary reason for going online. When questioned separately, nearly all of their parents said they doubted their child would access any pornography via the Internet.^{xvi} In Ireland, scientists are reportedly developing a program, in conjunction with the National Society for the Prevention of Cruelty to Children, designed specifically for teenagers who have become addicted to pornography.^{xvii} Interestingly, when asked about the effect of pornography for the *Pornified*/Harris poll, young people between the ages of 18 and 24 were often most likely of all generations to report negative consequences. Four in ten 18-to-24-year-olds believe pornography harms relationships between men and women, compared with only three in ten 25-to-40-year-olds. The Internet generation is also more likely to believe that pornography changes men's expectations of women's looks and behavior.

Touring around this country to promote my book, I heard again and again from concerned parents. "I know my 14-year-old son is looking at extremely hard-core pornography, but what can I do about it? He tells me he needs the computer for schoolwork." "I have a 10-year-old daughter. I don't want to even think about what boys her age are learning about the opposite sex online." "My daughter found pornography that my husband downloaded on the family computer." A pediatric nurse told me there was an incident in her practice in which *toddlers* acted out moves from a pornographic movie. A day's worth of nationwide headlines inevitably brings up stories of children encountering pornography at the local library, child pornography arrests, and school incidents in which teachers are caught looking at pornography on school computers during school hours. It is terrible enough that adults are suffering the consequences of a pornified culture. But we must think about the kind of world we are introducing to our children. Certainly everyone – liberals and conservatives, Democrats and Republicans – can agree with the statement, "It wasn't like this when we were kids." And I can't imagine anyone would have that thought without simultaneously experiencing a profound sense of fear and loss.

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Written Testimony of Rodney A. Smolla
United States Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Property Rights

I. Summary of Testimony

I wish to thank the Committee for this opportunity to testify. In my oral testimony I will outline in brief the First Amendment standards that operate as the constitutional framework within which Congress must consider any legislation regulating sexually explicit materials. In my remarks I will briefly set forth:

1. The governing constitutional standards for obscenity, as set forth in *Miller v. California*, 413 U.S. 15 (1973), *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), *Stanley v. Georgia*, 394 U.S. 557 (1969), and their progeny.
2. The special rules governing the intersection of the “adult obscenity” standard set forth in the *Miller* test with efforts to protect children. Among the important Supreme Court decisions are *Osborne v. Ohio*, 494 U.S. 103 (1990); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); *Ashcroft v. American Civil Liberties Union*, (*Ashcroft II*) 524 U.S. 656 (2004); *United States v. American Library Association, Inc.*, 123 S.Ct.2297 (2003); and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).
3. The “bottom line” as to what First Amendment doctrines are well-settled and what First Amendment doctrines remain unsettled as Congress grapples with attempts to balance the competing public policy and constitutional interests germane to: (a) the protection of rights of adults to access protected speech; (b) special privacy interests implicated when attempts are made to criminalize mere possession of otherwise unprotected speech; (c) the unique societal concerns posed by the compelling need to protect children from exposure to harmful materials and the dangers of sexual predators, particularly in the on-line environment; (d) the stresses

placed on law enforcement and on First Amendment doctrines by changes in technology that have altered the manner in which sexually explicit speech is marketed and distributed (through such media as the Internet, cable, and satellite television); and (e) the extent to which social science evidence dealing with harms to the marital stability, sexual attitudes and behaviors, and protection of the stability of families will or will not meet settled or developing First Amendment standards governing restrictions on sexually explicit expression.

II. Detailed Analysis of Recent Supreme Decisions

In this section of my written testimony I summarize in some detail several of the more important recent First Amendment decisions that I intend to discuss in my oral presentation.

Congress and the federal courts have been engaged in an “ongoing constitutional conversation” over the constitutionality of the Child Online Protection Act, or “COPA.”¹ In the aftermath of the Supreme Court’s decision in *Reno v. American Civil Liberties Union*,² Congress explored other avenues for restricting minors’ access to pornographic material on the Internet. Congress passed COPA, which prohibits any person from “knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.”³

Responding to *Reno v. American Civil Liberties Union*,⁴ Congress limited the scope of COPA’s coverage in at least three ways. First, while the CDA applied to communications over

¹ Act, 112 Stat. 2681-736 (codified in 47 U.S.C. § 231 (1994 ed., Supp. V)).

² 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

³ 47 U.S.C. § 231(a)(1).

⁴ 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

the Internet as a whole, including, for example, e-mail messages, COPA applied only to material displayed on the World Wide Web. Second, unlike the CDA, COPA covers only communications made “for commercial purposes.”⁵ Third, although the CDA prohibited “indecent” and “patently offensive” communications, COPA restricts only the narrower category of “material that is harmful to minors.”⁶

Drawing on the three-part test for obscenity set forth in *Miller v. California*,⁷ COPA defined “material that is harmful to minors” as

any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that--

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.⁸

⁵ The statute provides that “[a] person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.” 47 U.S.C. § 231(e)(2)(A) (1994 ed., Supp. V). COPA then defines the term “engaged in the business” to mean a person:

“who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income).” § 231(e)(2)(B).

⁶ *Id.*

⁷ 413 U.S. 15 (1973), 93 S.Ct. 2607, 3 L.Ed.2d 419 (1973).

⁸ 47 U.S.C. § 231(e)(6). Like the CDA, COPA also provided affirmative defenses to those

The United States Court of Appeals for the Third Circuit held COPA unconstitutional.⁹ The Court of Appeals based its decision entirely on a ground that COPA's use of "contemporary community standards" to identify material that is harmful to minors rendered the statute substantially overbroad as applied in the context of the World Wide Web, because Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users. The Court of Appeals reasoned that COPA would require any material that might be deemed harmful by the most puritan of communities in any state to be placed behind an age or credit card verification system.¹⁰ Hypothesizing that this step would require Web publishers to shield vast amounts of material, the Court of Appeals was persuaded that this aspect of COPA, without reference to its other provisions, "must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute."¹¹

The United States Supreme Court in *Ashcroft v. American Civil Liberties Union*,¹² (*Ashcroft I*) written by Justice Thomas, reversed the Third Circuit, holding that the Court of Appeals erred in its community standards analysis, holding instead that COPA's reference to contemporary community standards in defining what was harmful to minors did not alone render

subject to prosecution under the statute. An individual may qualify for a defense if he, "in good faith, has restricted access by minors to material that is harmful to minors--(A) by requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or © by any other reasonable measures that are feasible under available technology." § 231(c)(1). Persons violating COPA are subject to both civil and criminal sanctions. A civil penalty of up to \$50,000 may be imposed for each violation of the statute. Criminal penalties consist of up to six months in prison and/or a maximum fine of \$50,000. An additional fine of \$50,000 may be imposed for any intentional violation of the statute. § 231(a).

⁹ *American Civil Liberties Union v. Reno*, 217 F.3d 162 (3d Cir. 2000).

¹⁰ *Id.* at 175.

¹¹ *Id.* at 174.

¹² 122 S.Ct. 1700 (2002).

COPA unconstitutionally overbroad under the First Amendment. Unlike the CDA, the Court held, COPA applied to significantly less material and defined the harmful-to-minors material restricted by the statute in a manner parallel to the *Miller* definition of obscenity.

More significantly, the Court in *Ashcroft I* appeared to reject the argument that, at least on its face, the application of local community standards in Internet obscenity cases offended the First Amendment. Drawing on both *Hamling v. United States*,¹³ and *Sable Communications of California Inc. v. FCC*,¹⁴ the Court held that the First Amendment permitted the community standards approach to be applied even in the context of the Internet, a medium that largely knows no geographic boundaries. In *Hamling* the Court had considered the constitutionality of applying community standards to the determination of whether material is obscene under the federal statute prohibiting the mailing of obscene material.¹⁵ Justice Brennan, dissenting in *Hamling*, argued that it was unconstitutional for a federal statute to rely on community standards to regulate speech. Justice Brennan maintained that national distributors choosing to send their products in interstate travels would be forced to cope with the community standards of every hamlet into which their goods might wander.¹⁶ As a result, Justice claimed that the inevitable result of this situation would be “debilitating self-censorship that abridges the First Amendment rights of the people.”¹⁷ The Supreme Court in *Hamling*, however, rejected the Brennan view, holding instead that the “fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the

¹³ 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 2d 590 (1974).

¹⁴ 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989).

¹⁵ 18 U.S.C. § 1461.

¹⁶ *Hamling*, 418 U.S. at 144 (Brennan, J., dissenting).

¹⁷ *Id.*

materials does not render a federal statute unconstitutional.”¹⁸

Fifteen years later after *Hamling*, the Supreme Court in *Sable* addressed the constitutionality of a federal statutory provision prohibiting the use of telephones to make obscene or indecent communications for commercial purposes.¹⁹ A dial-a-porn operator challenged that portion of the statute banning obscene phone messages, arguing that reliance on community standards to identify obscene material impermissibly compelled message senders to tailor all their messages to the least tolerant community. Relying on *Hamling*, however, the Court once again rebuffed this line of attack on the use of community standards in a federal statute of national scope, stating that there “is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If *Sable*’s audience is comprised of different communities with different local standards, *Sable* ultimately bears the burden of complying with the prohibition on obscene messages.”²⁰

The Supreme Court in *Ashcroft I*²¹ held that there were no persuasive grounds for not applying *Hamling* and *Sable* to COPA. While those cases involved obscenity rather than material that was harmful to minors, the Court reasoned, there was reason to believe that the practical effect of varying community standards under COPA, given the statute’s definition of “material that is harmful to minors,” is significantly greater than the practical effect of varying community standards under federal obscenity statutes. The Court seemed especially troubled by the prospect that a holding that COPA was unconstitutional because of its use of community standards, federal obscenity statutes would likely also be unconstitutional as applied to the

¹⁸ *Id.*, at 106.

¹⁹ 47 U.S.C. § 223(b) (1982 ed., Supp. V).

²⁰ *Sable*, 492 U.S. at 125-126.

²¹ 122 S.Ct. 1700 (2002).

Web.²²

The Court strongly emphasized the limited scope of its decision. The Court did not express any view as to whether COPA suffers from substantial overbreadth for other reasons, whether the statute was unconstitutionally vague, or whether the District Court correctly concluded that the statute likely would not survive strict scrutiny analysis once adjudication of the case is completed.

The force of the holding in *Ashcroft* was blunted, however, by the alignment of dissenting and concurring opinions that, in combination, cast doubt on the firmness of the Court's rejection of the attack on community standards in the Internet context. Justice Stevens dissented, arguing that while Congress can prohibit the display of materials that are harmful to minors in the physical world, this attempt can break down on the Internet if local standards are employed. By aggregating values at the community level, Justice Stevens argued, the *Miller* test eliminated the outliers at both ends of the spectrum and provided some predictability as to what constitutes obscene speech. Community standards also serve as a shield to protect audience members, by allowing people to self-sort based on their preferences. Those who abhor and those who tolerate sexually explicit speech can seek out like-minded people and settle in communities that share their views on what is acceptable for themselves and their children. This sorting mechanism, however, does not exist in cyberspace; the audience cannot self-segregate. As a result, Justice Stevens maintained, in the context of the Internet this shield also becomes a sword, because the community that wishes to live without certain material not only rids itself, but the entire Internet of the offending speech.

Justice O'Connor, concurring in part, emphasized the that the case presented a facial challenge, and left open the possibility that the use of local community standards will cause problems for regulation of obscenity on the Internet, for adults as well as children, in future

²² Obscene material, for instance, explicitly falls within the coverage of COPA. See 47 U.S.C. § 231(e)(6) (1994 ed., Supp. V).

cases. In an as-applied challenge, Justice O'Connor noted, individual litigants may still dispute that the standards of a community more restrictive than theirs should apply to them. And in future facial challenges to regulation of obscenity on the Internet, litigants could make a more convincing case for substantial overbreadth. Where adult speech is concerned, for instance, there may in fact be a greater degree of disagreement about what is patently offensive or appeals to the prurient interest. Justice Breyer, also concurring, expressed the view that Congress intended COPA to apply a national community standard. Justice Kennedy, joined by Justices Ginsberg and Souter, reasoned that COPA's incorporation of varying community standards could impose the most puritanical community standard on the entire country, and that the national variation in community standards constitutes a particular burden on Internet speech. Nevertheless, those three Justices were unwilling to take the step of holding COPA void on its face for this reason, absent additional factual development.

On remand, the District Court again issued a preliminary injunction against enforcement of COPA, and Third Circuit again affirmed. *The Supreme Court in Ashcroft v. American Civil Liberties Union, (Ashcroft II)*²³ affirmed the decision of the lower courts. The critical passages of the Supreme Court's opinion, written by Justice Kennedy, stated:

The District Court, in deciding to grant the preliminary injunction, concentrated primarily on the argument that there are plausible, less restrictive alternatives to COPA. A statute that "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another ... is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno*, 521 U.S., at 874, 117 S.Ct. 2329. When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.

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²³ *Ashcroft v. American Civil Liberties Union, (Ashcroft II)* 524 U.S. 656, 127 S.Ct. 783, 159 L.Ed.2d 690 (2004).

In considering this question, a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal. The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the primary alternative considered by the District Court was blocking and filtering software. Blocking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them. The District Court, in granting the preliminary injunction, did so primarily because the plaintiffs had proposed that filters are a less restrictive alternative to COPA and the Government had not shown it would be likely to disprove the plaintiffs' contention at trial.

* * *

Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. All of these things are true, moreover, regardless of how broadly or narrowly the definitions in COPA are construed.

Filters also may well be more effective than COPA. First, a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America. The District Court noted in its factfindings that one witness estimated that 40% of harmful-to-minors content comes from overseas. *Id.*, at 484. COPA does not prevent minors from having access to those foreign harmful materials. That alone makes it possible that filtering software might be more effective in serving Congress' goals. Effectiveness is likely to diminish even further if COPA is upheld, because the providers of the materials that would be covered by the statute simply can move their operations overseas. It is not an answer to say that COPA reaches some amount of materials that are harmful to minors; the question is whether it would reach more of them than less restrictive alternatives. In *668 addition, the District Court found that verification systems may be subject to evasion and circumvention, for example by minors who have their own credit cards. See *id.*, at 484, 496-497. Finally, filters also may be more effective because they can be applied to all forms of Internet communication, including e-mail, not just communications available via the World Wide Web.

That filtering software may well be more effective than COPA is confirmed by the findings of the Commission on Child Online Protection, a blue-ribbon commission created by Congress in COPA itself. Congress directed the

Commission to evaluate the relative merits of different means of restricting minors' ability to gain access to harmful materials on the Internet. Note following 47 U.S.C. § 231. It unambiguously found that filters are more effective than age-verification requirements. See Commission on Child Online Protection (COPA), Report to Congress, at 19-21, 23-25, 27 (Oct. 20, 2000) (assigning a score for "Effectiveness" of 7.4 for server-based filters and 6.5 for client-based filters, as compared to 5.9 for independent adult-id verification, and 5.5 for credit card verification). Thus, not only has the Government failed to carry its burden of showing the District Court that the proposed alternative is less effective, but also a Government Commission appointed to consider the question has concluded just the opposite. That finding supports our conclusion that the District Court did not abuse its discretion in enjoining the statute.

Filtering software, of course, is not a perfect solution to the problem of children gaining access to harmful-to-minors materials. It may block some materials that are not harmful to minors and fail to catch some that are. See 31 F.Supp.2d, at 492. Whatever the deficiencies of filters, however, the Government failed to introduce specific evidence proving that existing technologies are less effective than the restrictions in COPA. The District Court made a specific factfinding that "[n]o evidence was presented to the Court as to the percentage of time that blocking and filtering technology is over- or underinclusive." *Ibid.* In the absence of a showing as to the relative effectiveness of COPA and the alternatives proposed by respondents, it was not an abuse of discretion for the District Court to grant the preliminary injunction. The Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective. *Reno*, 521 U.S., at 874, 117 S.Ct. 2329. It is not enough for the Government to show that COPA has some effect. Nor do respondents bear a burden to introduce, or offer to introduce, evidence that their proposed alternatives are more effective. The Government has the burden to show they are less so. The Government having failed to carry its burden, it was not an abuse of discretion for the District Court to grant the preliminary injunction.

One argument to the contrary is worth mentioning--the argument that filtering software is not an available alternative because Congress may not require it to be used. That argument carries little weight, because Congress undoubtedly may act to encourage the use of filters. We have held that Congress can give strong incentives to schools and libraries to use them. *United States v. American Library Assn., Inc.*, 539 U.S. 194, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003).²⁴

²⁴ *Ashcroft v. American Civil Liberties Union*, (*Ashcroft II*) 524 U.S. 656, 666-69, 127 S.Ct. 783, 159 L.Ed.2d 690 (2004).

The reference at the end of this passage to *United States v. American Library Association, Inc.*,²⁵ is important. In *American Library Association* the Supreme Court sustained, against a facial challenge, the Children's Internet Protection Act ("CIPA").²⁶ Under CIPA, a public library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them. The District Court held these provisions facially invalid on the ground that they induce public libraries to violate patrons' First Amendment rights.²⁷ The Supreme Court, in a plurality decision, reversed.²⁸

To help public libraries provide their patrons with Internet access, Congress created two forms of federal assistance. First, the E-rate program established by the Telecommunications Act of 1996 entitled qualifying libraries to buy Internet access at a discount.²⁹ Second, pursuant to the Library Services and Technology Act ("LSTA"),³⁰ the Institute of Museum and Library Services makes grants to state library administrative agencies to electronically link libraries with educational, social, or information services, assist libraries in accessing information through electronic networks, and pay costs for libraries to acquire or share computer systems and telecommunications technologies.³¹

²⁵ *United States v. American Library Association, Inc.*, 123 S.Ct.2297 (2003).

²⁶ 114 Stat. 2763A-335.

²⁷ *American Library Association, Inc., v. United States*, 201 F.Supp.2d 401 (E.D. Pa. 2002)., rev'd, *United States v. American Library Association, Inc.*, 123 S.Ct.2297 (2003).

²⁸ Chief Justice Rehnquist wrote the plurality opinion of the Court, joined by Justices O'Connor, Scalia, and Thomas. Justices Kennedy and Breyer concurred. Justices Stevens, Souter, and Ginsburg dissented.

²⁹ 110 Stat. 71, 47 U.S.C. § 254(h)(1)(B). In the year ending June 30, 2002, libraries received \$58.5 million in such discounts.

³⁰ 110 Stat. 3009-295, as amended, 20 U.S.C. § 9101 et seq.

³¹ 20 U.S.C. §§ 9141(a)(1)(B), (C), (E). In fiscal year 2002, Congress appropriated more than

The plurality opinion of Chief Justice Rehnquist noted that these programs have succeeded greatly in bringing Internet access to public libraries; by 2000, 95% of the Nations libraries provided public Internet access.³² By connecting to the Internet, the plurality noted, public libraries provide patrons with a vast amount of valuable information. But there is also an enormous amount of pornography on the Internet, much of which is easily obtained.³³ The accessibility of this material has created serious problems for libraries, the plurality claimed, problems that have found that patrons of all ages, including minors, regularly search for online pornography.³⁴ Some patrons also expose others to pornographic images by leaving them displayed on Internet terminals or printed at library printers.³⁵ In response to these perceived problems, Congress became concerned that the E-rate and LSTA programs were facilitating access to illegal and harmful pornography.³⁶

\$149 million in LSTA grants.

³² *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2301 (2003), citing J. Bertot & C. McClure, *Public Libraries and the Internet 2000: Summary Findings and Data Tables*, p. 3 (Sept. 7, 2000), <http://www.nclis.gov/statsuru/2000plo.pdf>.

³³ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2302 (2003), citing *American Library Association, Inc., v. United States*, 201 F.Supp.2d 401, 419 (E.D.Pa.2002).

³⁴ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2302 (2003), citing *American Library Association, Inc., v. United States*, 201 F.Supp.2d 401, 406 (E.D.Pa.2002).

³⁵ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2302 (2003), citing *American Library Association, Inc., v. United States*, 201 F.Supp.2d 401, 423 (E.D.Pa.2002).

³⁶ S.Rep. No. 105-226, p. 5 (1998). See also *The Children's Internet Protection Act: Hearing on S. 97 before the Senate Committee on Commerce, Science, and Transportation*, 106th Cong., 1st Sess., 49 (1999) (prepared statement of Bruce Taylor, President and Chief Counsel, National Law Center for Children and Families). See also *Obscene Material Available Via The Internet: Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce*, 106th Cong., 2d Sess. 1, 27 (2000) (citing D. Burt, *Dangerous Access*, 2000 Edition: *Uncovering Internet Pornography in America's Libraries* (2000)) (noting more than 2,000 incidents of patrons, both adults and minors, using library computers to view online pornography, including obscenity and child pornography).

Congress also determined that filtering software that blocks access to pornographic Web sites could provide a reasonably effective way to prevent such uses of library resources.³⁷ Indeed, by the year 2000 (before Congress enacted CIPA) almost 17% of public libraries used such software on at least some of their Internet terminals, and 7% had filters on all of them.³⁸ A library can set such software to block categories of material, such as “Pornography” or “Violence.” When a patron tries to view a site that falls within such a category, a screen appears indicating that the site is blocked. But a filter set to block pornography may sometimes block other sites that present neither obscene nor pornographic material, but that nevertheless trigger the filter. To minimize this problem, a library can set its software to prevent the blocking of material that falls into categories like “Education,” “History,” and “Medical.”³⁹ A library may also add or delete specific sites from a blocking category, and anyone can ask companies that furnish filtering software to unblock particular sites.⁴⁰

CIPA provides that a library may not receive E-rate or LSTA assistance unless it has a policy of Internet safety for minors that includes the operation of a technology protection measure that protects against access by all persons to “visual depictions” that constitute obscenity or child pornography, and that protects against access by minors to visual depictions that are harmful to minors.⁴¹ The statute defines a “[t]echnology protection measure” as “a specific

³⁷ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2304 (2003), citing *American Library Association, Inc., v. United States*, 201 F.Supp.2d 401, 420-26 (E.D.Pa.2002).

³⁸ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2304 (2003), citing Library Research Center of U. Ill., *Survey of Internet Access Management in Public Libraries* 8, <http://alexia.lis.uiuc.edu/gslis/research/internet.pdf>.

³⁹ *United States v. American Library Association, Inc.*, 123 S.Ct.2297 (2003).

⁴⁰ *United States v. American Library Association, Inc.*, 123 S.Ct.2297 (2003).

⁴¹ 20 U.S.C. §§ 9134(f)(1)(A)(I) and (B)(I); 47 U.S.C. §§ 254(h)(6)(B)(I) and (C)(I).

technology that blocks or filters Internet access to material covered by” CIPA.⁴² CIPA also permits the library to disable the filter “to enable access for bona fide research or other lawful purposes.”⁴³ Under the E-rate program, disabling is permitted during use by an adult.⁴⁴ Under the LSTA program, disabling is permitted during use by any person.⁴⁵

Various groups, including library associations, challenged the restrictions. A three-judge District Court ruled that CIPA was facially unconstitutional and enjoined the relevant agencies and officials from withholding federal assistance for failure to comply with CIPA.⁴⁶

The Supreme Court reversed. Congress, the Court held, has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.⁴⁷ But Congress may not induce the recipient to engage in activities that would themselves be unconstitutional. To determine whether libraries would violate the First Amendment by employing the filtering software that CIPA requires, the plurality reasoned, it was necessary to first “examine the role of libraries in our society.”⁴⁸ Public libraries, the plurality noted, pursue the worthy missions of facilitating learning and cultural enrichment. To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons.⁴⁹ Although they seek to provide a wide array of information, their goal has never been to

⁴² 47 U.S.C. § 254(h)(7)(I).

⁴³ 20 U.S.C. § 9134(f)(3); 47 U.S.C. § 254(h)(6)(D).

⁴⁴ 47 U.S.C. § 254(h)(6)(D).

⁴⁵ 20 U.S.C. § 9134(f)(3).

⁴⁶ *American Library Association, Inc., v. United States*, 201 F.Supp.2d 401 (E.D. Pa. 2002), rev’d, *United States v. American Library Association, Inc.*, 123 S.Ct.2297 (2003).

⁴⁷ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2304 (2003), citing *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

⁴⁸ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2304-07 (2003).

⁴⁹ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2304-07 (2003).

provide universal coverage.⁵⁰ Instead, public libraries seek to provide materials that would be of the greatest direct benefit or interest to the community.⁵¹ To this end, libraries collect only those materials deemed to have requisite and appropriate quality.⁵²

The plurality noted that in analogous contexts the Court had held that the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public.⁵³ Just as public forum analysis and heightened judicial scrutiny were incompatible with the role of public television stations,⁵⁴ and the role of the National Endowment for the Arts,⁵⁵ the plurality reasoned, so are they incompatible with the broad discretion that public libraries must have to consider content in making collection decisions. The plurality thus rejected the importation of public forum principles as the guide to whether the restrictions were constitutional.⁵⁶ Internet terminals are not acquired by a library in order to create a public forum for Web publishers to express themselves, the plurality reasoned.⁵⁷ Rather,

⁵⁰ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2304-07 (2003).

⁵¹ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2304-07 (2003).

⁵² *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2304 (2003), citing W. Katz, *Collection Development: The Selection of Materials for Libraries* 6 (1980) (“The librarian’s responsibility . . . is to separate out the gold from the garbage, not to preserve everything”); F. Drury, *Book Selection* xi (1930) (“[I]t is the aim of the selector to give the public, not everything it wants, but the best that it will read or use to advantage”).

⁵³ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2304 (2003), citing *Arkansas Ed. Television Comm’n v. Forbes*, 523 U.S. 666, 672-673, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998); *National Endowment for Arts v. Finley*, 524 U.S. 569, 585-586, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998).

⁵⁴ See *Arkansas Ed. Television Comm’n v. Forbes*, 523 U.S. 666, 672-673, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998).

⁵⁵ See *National Endowment for Arts v. Finley*, 524 U.S. 569, 585-586, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998).

⁵⁶ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2307-08 (2003).

⁵⁷ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2307-08 (2003).

a library provides such access for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.⁵⁸ The fact that a library reviews and affirmatively chooses to acquire every book in its collection, but does not review every Web site that it makes available, is not a constitutionally relevant distinction. The decisions by most libraries to exclude pornography from their print collections are not subjected to heightened scrutiny, the plurality held.⁵⁹ Similarly, it would make little sense to treat libraries judgments to block online pornography any differently.⁶⁰ Because of the vast quantity of material on the Internet and the rapid pace at which it changes, libraries cannot possibly segregate, item by item, all the Internet material that is appropriate for inclusion from all that is not.⁶¹ While a library could limit its Internet collection to just those sites it found worthwhile, it could do so only at the cost of excluding an enormous amount of valuable information that it lacks the capacity to review.⁶² Given that tradeoff, it is entirely reasonable for public libraries to reject that approach and instead exclude certain categories of content, without making individualized judgments that everything made available has requisite and appropriate quality.⁶³ As to the “overblocking” problem, the plurality held that concerns over filtering software’s tendency to erroneously overblock access to constitutionally protected speech that falls outside the categories software users intend to block were dispelled by the ease with which patrons may have the filtering software disabled.⁶⁴

⁵⁸ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2307-08 (2003).

⁵⁹ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2307-08 (2003).

⁶⁰ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2307-08 (2003).

⁶¹ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2307-08 (2003).

⁶² *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2307-08 (2003).

⁶³ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2307-08 (2003).

⁶⁴ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2307-08 (2003).

The plurality held that CIPA does not impose an unconstitutional condition on libraries that receive E-rate and LSTA subsidies by requiring them, as a condition on that receipt, to surrender their First Amendment right to provide the public with access to constitutionally protected speech.⁶⁵ When the Government appropriates public funds to establish a program, the plurality held, it is entitled to broadly define that program's limits.⁶⁶ The library filtering requirements do not deny a benefit to anyone, the plurality reasoned, but instead merely insist that public funds be spent for the purpose for which they are authorized: helping public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes.⁶⁷ Especially because public libraries have traditionally excluded pornographic material from their other collections, the plurality held, Congress could reasonably impose a parallel limitation on its Internet assistance programs.⁶⁸ As the use of filtering software helps to carry out these programs, it is a permissible condition.⁶⁹ The plurality distinguished the Court's legal services decision, *Legal Services Corporation v. Velazquez*.⁷⁰ In contrast to the lawyers who furnished legal aid to the indigent under the program at issue in *Velazquez*,⁷¹ the court reasoned, public libraries have no role that pits them against the Government, and there is no assumption, as there was in *Velazquez*, that they must be free of any

⁶⁵ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2308 (2003).

⁶⁶ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2308 (2003), citing *Rust v. Sullivan*, 500 U.S. 173, 194, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991).

⁶⁷ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2308 (2003).

⁶⁸ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2308 (2003).

⁶⁹ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2308 (2003).

⁷⁰ *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 542-543, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001).

⁷¹ *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 542-543, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001).

conditions that their benefactors might attach to the use of donated funds.⁷²

In his concurring opinion, Justice Kennedy concluded that if, as the Government represented, a librarian will unblock filtered material or disable the Internet software filter without significant delay on an adult user's request, there was in the end very little to the entire case. There were substantial Government interests at stake here: The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appeared to agree. Given this interest, and the failure to show that adult library users' access to the material was burdened in any significant degree, Justice Kennedy reasoned, the statute was not unconstitutional on its face.⁷³

Justice Breyer agreed with the plurality that the public forum doctrine was inapplicable and that the statute's filtering software provisions did not violate the First Amendment.⁷⁴ Justice Breyer stated, however, that he would not require only a "rational basis" for the statute's restrictions. Rather, he would examine the constitutionality of the statute's restrictions as the Court has examined speech-related restrictions in other contexts where circumstances call for heightened, but not strict scrutiny--where, for example, complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests. The key question in such instances is one of proper fit, Justice Breyer argued.⁷⁵ The Court has asked whether the harm to speech-related interests is disproportionate in

⁷² *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2308 (2003).

⁷³ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2309-10 (2003)(Kennedy, J., concurring) Justice Kennedy did reserve his views for a future as-applied challenge. If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, he held, that would be the subject for an as-applied challenge, not a facial challenge.

⁷⁴ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2310 (2003) (2003) (Breyer, J., concurring).

⁷⁵ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2310 (2003) (Breyer, J.,

light of both the justifications and the potential alternatives.⁷⁶ It has considered the legitimacy of the statute's objective, the extent to which the statute will tend to achieve that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately whether the statute works speech-related harm that is out of proportion to that objective.⁷⁷ Applying this standard, Justice Breyer found that the statute's restrictions satisfied constitutional demands.⁷⁸ Its objectives--of restricting access to obscenity, child pornography, and material that is comparably harmful to minors--were legitimate, and indeed often compelling. No clearly superior or better fitting alternative to Internet software filters had been presented.⁷⁹ Moreover, the statute contains an important exception that limits the speech-related harm: It allows libraries to permit any adult patron access to an overblocked Web site or to disable the software filter entirely upon request.⁸⁰ Given the comparatively small burden imposed upon library patrons seeking legitimate Internet materials, Justice Breyer reasoned, it could not be said that any speech-related harm that the statute may cause is disproportionate when considered in relation to the statute's legitimate objectives.

concurring).

⁷⁶ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2310 (2003) (Breyer, J., concurring).

⁷⁷ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2310 (2003) (Breyer, J., concurring).

⁷⁸ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2310 (2003) (Breyer, J., concurring).

⁷⁹ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2310 (2003) (Breyer, J., concurring).

⁸⁰ *United States v. American Library Association, Inc.*, 123 S.Ct.2297, 2311-13 (2003) (Breyer, J., concurring).

Testimony of

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STATEMENT OF RICHARD R. WHIDDEN, JR.

HEARING ON "WHY THE GOVERNMENT SHOULD CARE
ABOUT PORNOGRAPHY: THE STATE INTEREST IN
PROTECTING CHILDREN AND FAMILIES"

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND PROPERTY RIGHTS

November 10, 2005

Good afternoon. My name is Richard R. Whidden, Jr. and I am the Executive Director and Senior Counsel for the National Law Center for Children and Families headquartered in Fairfax, Virginia. The NLC was founded in 1991 as a non-profit organization dedicated to the protection of children and families across the nation. Today we concentrate on issues related to defending of children and families from sexual exploitation and sexually exploitative materials. I am a member of the Florida Bar and have practiced law for 16 years, primarily in the government sector. I have dealt with a variety of policy issues, including the determination of how government may address the health, safety, and welfare of its citizens. I am honored to be called to testify today.

Today you have heard testimony related to the harms of pornography. This testimony has included peer-reviewed studies and interviews with citizens about the effects of pornography on their lives and relationships. I will not delve further into the harm to individuals and families documented in the studies presented by Ms. Manning and the accounts reported by Ms. Paul. They are, in themselves, sobering reminders of the damage wrought by these materials. I will discuss instead how Congress, and in appropriate cases the states, have a compelling interest in regulating this material in order to protect children.

I should preface my comments by outlining the well-established interest the state has in regulating obscenity. In *Paris Adult Theater I v. Slaton*,¹ the U.S. Supreme Court held that obscene material does not acquire immunity from state regulation simply because it is exhibited to only to "consenting adults."² The Court discussed at length the numerous state interests—including the interests of the public in the quality of life, the tone of commerce in the great city centers, and public safety—that justify regulation *in addition to* the state's interest in protecting children and the "unwilling adult viewer."³ The Court

¹ 413 U.S. 49 (1973).

² *Id.* at 57.

³ *Id.* at 58. "These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." *Id.* "[T]here is a 'right of the Nation and of the States to maintain a decent society . . .'" *Id.* at 59-60, quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting).

further held that the obviously prurient nature of the material was a sufficient basis in itself to determine whether the material was obscene (the “material speaks for itself”), so that expert testimony was not required to prove obscenity.⁴ This decision had the effect of allowing the government to regulate obscenity without having to rely upon onerous levels of expert review of each and every investigation or prosecution commenced by the state.

It is thus clear that the government has a compelling interest in protecting children from exposure to sexually oriented materials. This was confirmed in the 1968 case of *Ginsberg v. New York*.⁵ In *Ginsberg*, the Court upheld on constitutional grounds a New York law prohibiting the sale of sexually explicit material to those under age 17, whether or not it would be considered obscene for adults. The Court opined that “the well-being of its children is of course a subject within the State’s constitutional power to regulate.” It also found that the state had an interest both in creating laws supporting parents, teachers, and others who have responsibility for children’s well-being,⁶ as well as an independent interest in the well-being of youth.⁷ According to the *Ginsberg* Court, the quantum of harm required to justify state action was minimal: so long as the government demonstrated that the material was harmful to minors (and therefore not constitutionally protected expression), an easy-to-meet rational basis test applied. In support of its conclusion, the Court cited various studies demonstrating that pornography was harmful to minors.⁸

It appears beyond doubt that the harms from obscenity recognized by the Court decades ago in *Ginsberg* have been greatly amplified in today’s hypersexualized environment. When *Ginsberg* was decided in 1968, the Internet was a figment of science fiction writers’ imaginations; satellites were something only NASA and the government used; cable TV was rare; and persons who sought obscene materials could obtain it in only a very few places. Today, obscene materials are easily accessible to us—and therefore to our children—as our home computers, classrooms, wireless communications devices such as phones and PDAs, and of course the vast wilderness of television. Obscene materials are no longer limited to the proverbial “plain brown wrapper.” The accessibility, affordability, and anonymity of the Internet has had an adverse effect on our children and families.

Congress has taken several steps in the past years to address these harms. For example, the Children Internet Protection Act⁹ or CIPA was upheld as a legitimate exercise of federal funding discretion. Specifically, the Court held that Congress could fund library Internet access only on the condition that libraries adopt Internet filtering policies.

⁴ *Id.* at 56 n.6.

⁵ *Ginsberg v. New York*, 390 U.S. 629 (1968) (affirming the government’s interest in protecting children, a law defining obscenity in terms of appeal to prurient interest of minor was constitutional.)

⁶ *Id.* at 639.

⁷ *Id.* at 640.

⁸ *Id.* at 643.

⁹ 114 Stat. 2763A-335, Codified in 47 U.S.C. §254 and 20 U.S.C. §9101 *et seq.*

On a preliminary injunction in *Ashcroft v. ACLU*, the Court held the Child Online Protection Act¹⁰ unconstitutional because on the record before the Court, COPA was not the least restrictive alternative under a First Amendment analysis.¹¹ It is also important to note that the Court specifically noted in the *Ashcroft* case that Congress could regulate the Internet to prevent minors from gaining access to harmful materials.¹²

It has also been established that the law may address the methods of distribution of pornography. Justice Sandra Day O'Connor wrote about the regulation of Internet pornography in a way that is analogous to the zoning laws, allowing a segregation of harmful material.¹³ Specifically, the government may address the secondary effects of pornography on children and families in the time, place, and manner of the distribution. The Internet that Justice O'Connor referred to was the relatively nascent Internet of 1997, and she lamented the lack of technology available at that time to empower parents to protect their children, suggesting that technology could provide that ability in the future. Investigating technological capabilities and encouraging the development of new technology that can help parents should be encouraged by Congress and this Committee.

I submit that Congress and the States should consider the following:

- Encouraging research concerning the effects of pornography on children and families. Additionally, research on the effects of this material on the human brain and its addictive nature should be continued.
- Fostering the development of additional technological answers that allow families to protect their children while they use the Internet.
- Legislation that allows parents to hold illegal pornography distributors responsible for the harm done to their children.
- Legislation that would aid in keeping sexual material away from sexual predators who use that material to groom victims for abuse.

I thank the Committee for the opportunity to testify today on this issue so important to families and to society.

¹⁰ 47 U.S.C. §231

¹¹ *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (It should be noted that this case was only decided as a preliminary injunction. The case has been sent back to the trial court for adjudication on the merits. This procedural element is important because it will allow the government to present more current technology in defense of the act, which may lead to a finding of constitutionality.)

¹² *Id.* at 705 ("On a final point, it is important to note that this opinion does not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials.")

¹³ *Reno v. ACLU*, 521 U.S. 844, 886 (1997)